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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. 443, 444, and 445

EDWIN K. ATWOOD and ALICE B. ATWOOD,
Petitioners,

vs.

ROBERT J. KLEBERG, JR., CAESAR KLEBERG, RICHARD MIFFLIN KLEBERG, JOHN D. FINNEGAN, SAMUEL G. RAGLAND and RICHARD KING, JR., individually and as Trustees under the Last Will and Testament of Henrietta M. King, Deceased, et al.,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BRADY COLE,
Counsel for Petitioners.

THOMAS H. FISHER,
Of Counsel.

U.S. LAW PRINTING CO., PHONE LAKEVIEW 6581, CHICAGO, ILLINOIS

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Nos. ....., ..., and .....

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ROBERT J. KLEBERG, JR., CAESAR KLEBERG, RICHARD MIFFLIN KLEBERG, JOHN D. FINNEGAN, SAMUEL G. RAGLAND and RICHARD KING, JR., individually and as Trustees under the Last Will and Testament of Henrietta M. King, Deceased, et al.,
Respondents.

PETITION FOR WRITS OF CERTIORARI.

To The Honorable, The Supreme Court Of The United States:

SUMMARY STATEMENT OF MATTER INVOLVED.

Your petitioners, Edwin K. Atwood and Alice B. Atwood, praying for a Writ of Certiorari in each of these three appeals to review a single decision of the United

States Circuit Court of Appeals for the Fifth Circuit affirming three decrees entered in the District Court of the United States for the Southern District of Texas, respectfully submit:

These cases involve a Texas trust created by the Will of Henrietta M. King (R. 33-60), who was the owner of the famous KING RANCH comprising One Million Acres in southern Texas. Petitioners are two grandchildren of Mrs. King, who died on March 31, 1925, and her husband, Captain Richard King, who died in 1885. Respondents are the trustees under the Will (together with certain of the beneficiaries thereunder.)

The trust created by Mrs. King's Will was limited to a ten-year period from her death, the trust thus terminating on March 31, 1935 (R. 33-60). Petitioners, who were named as beneficiaries of the trust in the Will, brought an accounting action to settle the trustees' accounts covering the entire period of the trusteeship (R. 116). The trial court's jurisdiction in the accounting action was based upon diversity of citizenship between petitioners, who are both residents of Illinois, and the respondent trustees, all of whom are residents of Texas (R. 8-9). The two supplemental proceedings covering final settlement of the Trust Estate were also based upon diversity of citizenship (11717, R. 13; 11704, R. 11).

The trial court appointed a Special Master on May 2, 1936, with authority *only* to pass upon *questions and issues of fact* (R. 116). The Master held hearings between June, 1936 and September 1, 1939, and filed his "Findings of Fact" on November 12, 1942, containing many *conclusions of law*, as well as numerous findings of fact (R. 355-477).

On August 11, 1944, the trial court rejected all of the

Master's *conclusions of law* (R. 526). At the same time, the trial court adopted *en masse* all of the Master's findings of fact, and on September 7, 1944, entered a final decree against petitioners approving *in toto* the respondent trustees' accounts (R. 316).

Petitioners then appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which affirmed the trial court on July 2, 1947 (R. 1003-17). Mr. Justice Waller filed a separate opinion, dissenting in part from the majority opinion (R. 1016-7). Petitioners thereupon filed their petition for rehearing (R. 1019-1101), which was denied on August 21, 1947 (R. 1102).

The Circuit Court's majority opinion was apparently grounded upon the utterly erroneous doctrine, which was never the law in Texas, not only that the "burden of proof" in an ordinary accounting action such as this, brought by beneficiaries against their trustees to wind up the affairs of the Trust Estate after its termination, is upon the beneficiaries, but also that the beneficiaries must go even further and bear the burden of proving "fraud" or "overreaching" on the part of the trustees (R. 1007-9).

Moreover, the Circuit Court failed to apply the Texas law that trustees may not directly benefit themselves, or their wives and families, by their own transactions with their Trust Estate, no matter what exculpatory provisions the trust instrument contains, it being a well-settled rule of Texas law that a trustee can make no profit for himself out of his trust.

Under the well-considered decisions of this Court, starting with *Erie Railway Co.* v. *Tomkins*, 304 U. S. 64, and *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, and con-

tinuing down to the recent decision in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, it was the duty of the District and Circuit Courts to apply the Texas law of trusts to the facts as found by the Master and confirmed by the trial judge in this case. This the District and Circuit Courts failed to do.

The District and Circuit Courts also failed to apply, and refused to be bound by, the Texas Revised Civil Statutes, in defiance of the Rules of Decision Act (Section 725 of the Judicial Code (28 U. S. C. A. 725)), and the many cases, decided by this Court, both before and after the *Erie Railway Co.* case, requiring the Federal Courts to follow and be bound by State statutes when applicable to the controversy before them.

We have selected several of the most flagrant breaches of trust by the trustees to illustrate the failure of the District and Circuit Courts to apply the Texas statutes and the Texas law of trusts in this case, such breaches of trust involving losses to the Trust Estate of more than Two Million Dollars.

I.

The Trustees Paid $300,000 To Three Of Their Own Number As "Executors' Fees."

The Master found (R. 356) and the trial judge confirmed (R. 526) that Mrs. King died on March 31, 1925, and that, following the admission of her Will to probate on May 6, 1925,

> "*The* [*seven*] *trustees immediately undertook the performance of said trust and continued to act as such until March* 31, 1935, at which time they partitioned the principal assets of the estate, . . ." (R. 356).

Among the seven testamentary trustees were Robert J. Kleberg, Caesar Kleberg, and Richard King, Jr., who were also named as *independent executors* in the Will (R. 356). The seven trustees paid to these three of their own number, who were also named as *executors*, the sum of $300,000 as "executors' fees" (R. 370).

The Master found (R. 370) and the trial judge confirmed (R. 526) that "the cash receipts [of the Trust Estate] during the trust period amounted to $18,457,356.92 (Def. Ex. 182), and the cash disbursements amounted to approximately the same sum." The fact that all of these funds *were received and disbursed only by the trustees, and not by the executors,* was conclusively established before the Master by the evidence, including the letter written by J. K. Wells, attorney for the trustees, to petitioners' counsel in 1928 (Pl. Ex. 674), stating that the executors had filed an inventory, appraisement and list of claims under the Texas statute but had filed no reports thereafter. The crucial sentence in the letter reads:

> "*In accordance with the terms in the Will, as soon as the Will was probated the Trustees took over the property and have been managing it and holding it as a trust ever since.*" (Italics added.)

The fact that none of the cash receipts were paid to, and none of the cash disbursements were made by, *the executors, as distinguished from the trustees,* is also conclusively established by Mr. Justice Waller's dissenting opinion (R. 1017). After quoting that part of the Will which provided "that, no other action shall be had in the County Court or in any court having jurisdiction in matters of probate, in relation to my estate or the settlement thereof, than the probating and recording of this, my Last Will, and the return and filing of an Inventory and Appraisement, and

List of Claims, of my Estate" (R. 1016), Mr. Justice Waller concluded:

> "From the foregoing, therefore, the duties of the executors were restricted to probating and recording the will, filing an inventory and appraisement, and list of claims. They were not required to render any accounting nor to give any bond. *The operation and management of the estate was entirely in the hands of the trustees*" (R. 1017). (Italics added.)

Mr. Justice Waller also quoted the provisions of the Will limiting the trustees' compensation to ten per cent (10%) of the net revenues of the Trust Estate (R. 1016). (This compensation the Master and the trial court found had been paid in full under the description of "commissions" of $111,752.76, and "salaries" as employees of the Trust Estate of $297,448.02) (R. 336, 360, 366, 526). He then stated (R. 1017):

> "Moreover, in the Federal estate tax return which was sworn to by the executors, they only claimed as fees to the executors the sum of $110,394.39. The addition of the sum of $189,605.61 seems to be somewhat of an afterthought. *I think that the fees allowed the executors are grossly excessive in view of the provisions of the will, the narrowness of their duties, and the compensation received by them as trustees and as employees of the Trust Estate.* I would, therefore, remand the case solely for the purpose of having the [District] Court below fix the fees of the executors *at an amount that would be but nominal* in comparison to the fees which the trustees agreed upon and which the Court allowed to stand." (Italics added.)

Mr. Justice Waller's dissenting opinion, therefore, is based upon the proposition that, since *the executors* had only nominal duties under Mrs. King's Will and, since *only the trustees* operated and managed the "entire" estate *and the executors did not do so,* the so-called "executors' fees" of $300,000 were "grossly excessive."

But Mr. Justice Waller, as well as the majority of the Circuit Court, wholly ignored Articles 3689 and 3690 of the Texas Revised Civil Statutes, which clearly provide that Texas executors are not entitled to any "executors' fees" *except upon moneys which "they may actually receive in cash, and . . . they may pay out in cash in the course of their administration"* (Article 3689). The Texas Statute also specifically deprives Texas executors of the right to receive any "executors' fees" upon "any cash which was on hand at the time of the death of the testator or intestate," or "money realized from the sale of property and the paying out of the proceeds in satisfaction of the debt" of the deceased, or "for paying out money to the heirs and legatees as such" (Article 3690). These Articles 3689-90 are quoted in the Appendix to our Brief below.

Moreover, the Texas decisions interpreting Articles 3689-90 of the Texas Revised Civil Statutes clearly hold that unless Texas executors can qualify for fees thereunder, *they are not entitled to any executors' fees.* The cases are cited in our Brief below.

Under the clear facts as found by the Master and confirmed by the trial judge, *and also confirmed by Mr. Justice Waller,* therefore, the seven trustees, who exclusively operated and managed the Trust Estate from its inception to its termination, were unjustified in paying $300,000 as "executors' fees" to three of their own number who, as executors, were not qualified to receive one penny thereof under Articles 3689-90 of the Texas Revised Civil Statutes.

The District and Circuit Courts failed to apply the Texas statutes and the Texas law of trusts to this breach of trust.

II.

The Trustees Expended $451,115.81 For "New Improvements" on Mrs. Kleberg's Lands, And $91,499.40 For "New Improvements" On Robert J. Kleberg, Jr.'s Lands.

The Master found (R. 386) and the trial judge confirmed (R. 526, 531) that the trustees "expended the sum of $451,115.81 for the purpose of improving the 174,791.36-acre tract owned by it *and the* 30,439.23 *acres leased by it from Mrs. Alice G. K. Kleberg, known as the Santa Gertrudis Ranch," which was not owned by the Trust Estate;* and that the trustees also expended $91,499.40 "for new improvements" *on the land owned by Robert J. Kleberg, Jr., which also was not owned by the Trust Estate* (R. 385-6, 526). Mrs. Alice G. K. Kleberg was the wife of one trustee (Robert J. Kleberg), and the mother of two other trustees (Robert J. Kleberg, Jr., and Richard M. Kleberg) (R. 45).

The Texas courts have uniformly held that Texas trustees may not improve their individually-owned real properties with trust funds, and that Texas trustees may not expend trust funds for their own individual benefit by making permanent "new improvements" on lands privately owned by them or their spouses, without thereby breaching their trust.

The District and Circuit Courts failed to apply the Texas law of trusts to these breaches of trust.

III.

The Trustees Paid The "Living Expenses" Of Mrs. Alice G. K. Kleberg And Her Family, Servants, Guests And Friends From The Trust Estate.

The Master found (R. 360-1, 394-5) and the trial court confirmed (R. 526) that the trustees paid the "living expenses" of Mrs. Alice G. K. Kleberg and her family, servants, guests and friends with funds from the Trust Estate. The Master failed to find the amount in dollars of these "living expenses" because, he found, "it is not possible to segregate" this cost from the other expenses of the Trust Estate (R. 394-5).

The Master further found (R. 362, 364-5) and the trial judge confirmed (R. 526) that the trustees also paid part of the "living expenses" of three of the trustees (Richard M. Kleberg, Richard King, and Robert J. Kleberg, Jr.), while all of them were living in their own homes on their own or on Mrs. Kleberg's real estate.

The evidence showed that the "living expenses" of Mrs. Kleberg and her family, servants, guests and friends were included in accounts totaling over $775,242.62 (Pl. Ex. B, C, D) and that the "living expenses" of the three trustees and their families, servants, guests and friends were merged in accounts totaling in excess of $250,000 (Pl. Ex. B, C, and D). It was from these accounts, exceeding the sum of $1,000,000, that the Master found these "living expenses" could not be "segregated." Included in other expense accounts were such items as oil paintings purchased with trust funds totaling in excess of $3,500, which were hung on the walls of Mrs. Kleberg's Santa Gertrudis Ranch house (Master's Ex. 152). Under Texas law, the burden was on the trustees to keep accurate and "segregatable" accounts.

Mr. Justice Waller in his dissenting opinion (R. 1016) quotes *verbatim* the "compensation" clause (Article Tenth) of Mrs. King's Will, which definitely and postively forbade the trustees to pay themselves any "compensation" by way of "living expenses." (R. 56).

Under Texas law, Mrs. King had the undeniable right to limit the "compensation" to be received by her trustees from her Trust Estate. There was certainly no provision in the Will authorizing the payment of Mrs. Kleberg's "living expenses" as such.

The trustees attempted to justify the payment of Mrs. Kleberg's "living expenses" between 1925 and 1935 as added "salary" paid to her husband, Robert J. Kleberg (who died in 1932), for his services as an employee of the trustees; but petitioners offered in evidence Robert J. Kleberg's Federal income tax returns from 1925 to 1932, which showed conclusively that he had not claimed that these "living expenses" paid by the trustees constituted income to him for his services from the Trust Estate during any of these years (Pl. Ex. 552-9; Def. Ex. 455-462). Of course, between 1932 and 1935, when Robert J. Kleberg was no longer living, the payment of his widow's "living expenses" could not possibly have been part of his "salary" or other "compensation" *on any conceivable theory.* These "living expenses" for this limited period exceeded a Quarter of a Million Dollars.

Petitioners also offered in evidence the Federal income tax returns filed by the trustees themselves from 1925 to 1935, showing that the trustees had excluded the "living expenses" of Mrs. Kleberg and her family as claimed deductions for Federal income tax purposes (Pl. Ex. 34-44).

The District and the Circuit Court failed to apply the Texas law of trusts precluding trustees from paying their own or their families' "living expenses," regardless of their "good faith" or any of the powers granted them under the Will.

IV.

The Trustees Paid $480,855.13 To Robert J. Kleberg, Jr. As "Rental" On Lands Owned By Him.

The Master three times found (R. 385-6, 389) and the trial judge confirmed (R. 526, 530) that *the trustees* (*not* Mrs. King) "leased" the privately owned lands of Robert J. Kleberg, Jr., known as the Encino and Stillman Ranches, under a written lease upon the Encino Ranch and under an oral lease on the Stillman Ranch, and paid him so-called "rental" therefor totaling $480,855.13.

The District and Circuit Courts failed to apply either the Texas Revised Civil Statutes (Articles 1288 and 3995) providing that "oral leases" of lands for more than one year are not enforcible, or the Texas law of trusts whereby trustees may not lease their own lands to their Trust Estate at a "rental" profit of nearly Half a Million Dollars. Articles 1288 and 3995 are quoted in the Appendix.

The Master also found (R. 393) and the trial judge confirmed (R. 529, 590) that the trustees paid $120,000 of so-called "rental" to Mrs. Alice G. K. Kleberg under a written lease (Pl. Ex. 178; Def. Ex. 210) made by Mrs. King on January 1, 1919 but renewed by the trustees each year during the ten-year trust period from 1925 to 1935, which lease covered and included the Palo Alto Farms comprising 8,111.9 acres owned by Mrs. Kleberg in 1919, but which lands were never in the possession of the trustees because

they had been given by Mrs. Kleberg to her son, Robert J. Kleberg, Jr., and had been sold by him to third persons *before Mrs. King's death.* It was from the proceeds of this sale that Robert J. Kleberg, Jr. had purchased the very same Encino and Stillman Ranches upon which the trustees later paid him $480,855.13 as alleged "rental" during the trust period. Thus the trustees paid "double" rental (1) of $480,855.13 to Robert J. Kleberg, Jr. upon the Encino and Stillman Ranches and (2) of $120,000 to his mother, Mrs. Kleberg, upon the Palo Alto Farms which he sold in 1924, using the proceeds of sale to purchase the Encino and Stillman Ranches, *before Mrs. King died.*

The District and Circuit Courts failed to apply the Texas law of trusts holding that trustees may not make a personal profit, either by leasing their own individually owned lands to the Trust Estate or in any other manner, without violating their "duty of loyalty" to their beneficiaries, and thus breaching their trust.

V.

The Trustees Purchased Real Property From A Corporation Wholly Owned By Two Trustees.

The Master found (R. 369, 413) and the trial court confirmed (R. 526) that the trustees purchased real property called the "Kimmel Farm" for $13,904.27 from Kingsville Land & Investment Company, a Texas corporation, whose entire capital stock was owned by two trustees (Robert J. Kleberg and Caesar Kleberg).

Under Texas Revised Civil Statutes (Article 7425 b-12), enacted in 1945, a trustee may not purchase his individually owned property, or enter into any such transaction in in which he has a personal interest. Article 7425 b-12

is quoted in the Appendix. Under the Texas law of trusts, it has always been held that trustees may not purchase with trust funds real property from themselves or from a corporation wholly owned or controlled by them without breaching their trust.

The District and Circuit Courts failed to apply the Texas statutes and the Texas law of trusts to the foregoing breach of trust.

VI.

The Trustees Made Charitable, Political, And Wedding Gifts Of Trust Funds.

The Master found (R. 3, 198) and the trial court confirmed (R. 526, 531) that Mrs. King devised two city lots to the Congregation of the Presbyterian Church, South, of Brownsville (R. 34), but that she had adeemed the devise by the sale of the lots in her lifetime. Mrs. King in her Will also directed her trustees *themselves* (*not* the devisee) "out of the Funds in their hands" to expend "not to exceed the sum of $5,000," for the purpose of erecting a residence "on said Lots." The trustees gave to the Treasurer of the church $6,500 "in lieu of" the adeemed devise, plus $5,000 of trust funds, which $5,000 could not have been used to erect the residence because of the ademption.

The Master also found (R. 401, 405) and the trial judge confirmed (R. 526) that the trustees made "gifts" or "donations" of $6,729.30 to the National Democratic Committee (1) to elect R. S. Sterling and Clinton Small as Governors of Texas, and (2) to defeat the election of Herbert Hoover as President of the United States.

The Master also found (R. 402) and the trial judge confirmed (R. 526) that the trustees paid $2,500 from the Trust Estate to Robert J. Kleberg, Jr. at the time of his wedding in 1926 "in response to his demand for additional compensation for his services"; but Richard King and Richard M. Kleberg, two of the trustees, admitted in their sworn testimony that this $2,500 of trust funds was paid to Robert J. Kleberg, Jr. as a "wedding present" or wedding "gift" (M. R. 8207, 8209); and the actual Voucher 1840 dated April 7, 1926 (Pl. Ex. 218), offered in evidence by petitioners, shows that the sum of $2,500 was paid to Robert J. Kleberg, Jr. as a "gift" and was charged to "donations" on the trustees' books.

The District and Circuit Courts disregarded the Texas statutes and the Texas law of trusts holding that trustees may not "give away" trust assets, and particularly that trustees may not make "wedding gifts" to themselves from this Trust Estate.

VII.

The Trustees Failed to Collect The Indebtedness Of Richard King, Sr. To The Trust Estate Aggregating $306,209.33.

The Master found (R. 423, 467) and the trial court confirmed (R. 526) that at the inception of the trust period the Estate of Richard King, Sr. (son of Captain King) was "indebted to Mrs. King on notes receivable aggregating $21,000, and on open account in the sum of $255,209.33, exclusive of interest," together with $30,000 advanced by Mrs. King for Richard King, Sr. Estate's account, making a total indebtedness to Mrs. King at her death, and therefore to her trustees, aggregating $306,209.30. This claim for $306,209.30 against the Estate of Richard King, Sr. was thus an asset of the Trust Estate.

The Estate of Richard King, Sr. descended, in an insolvent condition, to Richard King, Jr. (grandson of Captain King), one of Mrs. King's trustees, and his two sisters, early in the trust period, as the Master found (R. 423-4). The evidence showed that *at least two-thirds of this indebtedness was fully collectible at Mrs. King's death in* 1925, and that *the entire amount* could have been collected by the end of the trust period in 1935 (M. R. 6108-9, 6113, 6525).

Neither the District nor Circuit Courts applied the Texas law of trusts to the trustees' failure to collect this indebtedness, or such part of it as was collectible, it being a breach of trust for Texas trustees not to collect all claims due the Trust Estate, especially when such indebtedness is due from one of the trustees themselves, or is collectible from property held by one of the trustees.

VIII.

The Trustees Failed To Collect The Note Receivable Of Robert J. Kleberg, Sr. And Others For $196,587 Held By The Trust Estate.

The Master found (R. 459) and the trial court confirmed (R. 526) that at her death Mrs. King held the (renewal) note receivable of Robert J. Kleberg and others in the principal sum of $196,587 dated November 4, 1924, less than five months before her death in 1925 (Pl. Ex. 122).

Based entirely upon oral testimony given in defiance of the "Texas Dead Man's Statute" (Article 3716 of the Texas Revised Statutes), the Master found (R. 459-462) and the trial court confirmed (R. 526) that Robert J. Kleberg's obligation on this renewal note executed on November 4, 1924 *had been released by matters taking place prior*

to the time that Robert J. Kleberg and others signed the $196,587.00 *renewal note on November* 4, 1924. Article 3716 is also quoted in the Appendix.

The District and Circuit Courts failed to rule that the oral testimony given in defiance of the Texas "Dead Man's Statute" (Texas Civil Revised Statutes, Article 3716), relating to matters taking place prior to the giving of the renewal note by Robert J. Kleberg and others, payable to Mrs. King shortly before her death, which note comprised one of the assets of her Trust Estate, constituted no defense to the trustees' breach of trust for failure to collect such note receivable during the trust period.

IX.

The Trustees Paid The Operating Expenses Of And Purchased Property From Kleberg Town & Improvement Company, A Corporation, One-Half Of Whose Stock Was Owned By Alice G. K. Kleberg.

The Master found (R. 416-7) and the trial court confirmed (R. 526) that Mrs. Alice G. K. Kleberg owned one-half of the entire capital stock of Kleberg Town & Improvement Company, a Texas corporation; that the trustees "paid all of the rent and telephone expenses for the office and telephones" charged to, and "used by" this company, which aggregated $42,273.39; and that the trustees purchased certain real estate known as the "Worrel House" for $2,561.21 from this company.

The District and Circuit Courts failed to apply the Texas statutes and the Texas law of trusts holding that trustees may not purchase properties from themselves or from corporations owned or controlled by them, and may not use trust funds for the benefit of themselves or a corporation owned or controlled by them or by their spouses.

X.

The Trustees Failed To Collect From Mrs. King's Partners In The Kleberg Bank, A Co-Partnership, Their Ninety Per Cent Share Of Losses Aggregating $499,101.13 Under Their Right To Contribution From The Other Partners.

The Master found (R. 406-10) and the trial court confirmed (R. 526) that Mrs. King at the time of her death was a co-partner, to the extent of only a ten per cent (10%) interest, in the Kleberg Bank, a co-partnership doing business in Kingsville, Texas; and that the trustees of her Trust Estate paid from trust funds one hundred per cent (100%) of the losses of the partnership aggregating $499,101.13.

The Master further found (R. 409-10) and the trial judge confirmed (R. 526) that at the time the Trust Estate suffered this loss of $499,101.13, the trustees had *a right of contribution* for the other ninety per cent (90%) of this loss against the other bank partners, three of whom were also trustees of Mrs. King's Trust Estate, but that no part of this sum was ever actually collected by the trustees. The Master found (R. 409-10):

> "In December, 1934, most of the members of the [Kleberg Bank] partnership were unable to make any contribution toward the losses sustained by the estate. *Some recovery, however, could have been had, particularly from Caesar Kleberg, Richard Kleberg and Robert. J. Kleberg, Jr. No action was taken by the executors and trustees to secure contributions from the other members of the firm.*" (Italics added.)

Under Texas law (and also under Article 14 of the partnership articles of the Kleberg Bank), Mrs. King's death terminated the partnership relation, as though she had voluntarily resigned on the date of her death (Pl. Ex. 64,

Def. Ex. 41). The Kleberg Bank's insolvency was actually caused by bank loans aggregating $832,030.53, which loans were made by the bank's partners to themselves (including several of Mrs. King's trustees), almost all of which loans were created after Mrs. King's death in 1925, as shown by the Federal Reserve Bank Examiners' written Report (Pl. Ex. 65, Def. Ex. 192; R. 407).

The District and Circuit Courts failed to apply the Texas law requiring the trustees to collect the claims of the Trust Estate, and especially such parts as were found by the Master to be collectible from themselves.

Mrs. King's trustees committed other breaches of the trust law of Texas involving substantial losses to the Trust Estate, as described in the petition for rehearing filed in the Circuit Court (R. 1019-1101).

STATEMENT OF BASIS OF THIS COURT'S JURISDICTION.

The decision of the Circuit Court of Appeals for the Fifth Circuit in this case fails to apply the statutory and trust law of Texas applicable to the compensation of Texas executors and to the administration of Texas trust estates, as required by federal statute (the Rules of Decision Act, Section 725 of the Judicial Code, 28 U. S. C. A. 725) and the Federal cases construing the same, and as required by the decisions of this Court embodied in *Erie Railway* v. *Tomkins*, 304 U. S. 64, and *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, and subsequent decisions under which the District Courts and the Circuit Court of Appeals must apply the state statutes and state law to diversity cases brought in the Federal Courts.

Moreover, Rule 38 (5) (b) of this Court specifically states that a writ of *certiorari* may properly be granted "where a Circuit Court of Appeals has decided a federal question is a way probably in conflict with applicable decisions of this Court." As we show by the Argument below, this Court has consistently granted writs of *certiorari* where, as in the case at bar, the District and Circuit Courts have decided a case in plain violation of the state statutes and state law applicable thereto.

QUESTIONS PRESENTED.

1. Did the Circuit Court of Appeals for the Fifth Circuit apply Articles 3689-90 of the Texas Revised Civil Statutes in approving the payment by Mrs. King's seven testamentary trustees of $300,000 as "executors' fees" to three of their own number who were also named as independent executors in her Will?

2. Did the Circuit Court of Appeals for the Fifth Circuit apply the Texas statutes and the Texas law of trusts to the expenditures by the trustees of trust funds from their Trust Estate to make "new improvements" on lands owned by themselves or their spouses and for other purposes benefiting the trustees personally, and to the trustees' failure to collect the claims of the Trust Estate against themselves and others, as well as in other matters above mentioned connected with the administration of the Trust Estate created under Mrs. King's Will?

REASONS FOR THE ALLOWANCE OF THE WRIT.

Under the Federal Rule of Decisions Act (Section 725 of the Judicial Code, 28 U. S. C. A. 725) and the decisions

of this Court construing it, and the many decisions of this Court applying the rule first enunciated in *Erie Railway Co.* v. *Tomkins,* 304 U. S. 64, and *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202, the Federal Courts are mandatorily required to apply the statutory and decision law of the several states, including the State of Texas, to controversies which, if decided in the state courts, would have been governed by the state statutes and decided cases applicable thereto.

Starting with the *Erie Railway Company* and *Ruhlin* cases, and continuing down to *Guaranty Trust Co.* v. *York,* 326 U. S. 99, and *Williams* v. *Green Bay & W. R. Co.,* 326 U. S. 549, this Court has consistently granted writs of *certiorari* where the District and Circuit Courts have failed to apply state law to controversies in diversity cases which would have been determined in the state courts under such state law. The cases are cited in the Argument below.

It amply appears that the decision of the Circuit Court of Appeals for the Fifth Circuit in this case is directly in conflict with Section 725 of the Judicial Code and with the decisions of this Court requiring the Circuit Court to apply the Texas statutes and the Texas law of trusts to the administration of Mrs. King's Trust Estate by her testamentary trustees.

Neither the District Court nor the Circuit Court has applied the Texas statutes and the Texas law of trusts in this case, under which the trustees of Mrs. King's Trust Estate have been guilty of breaches of trust aggregating in excess of Two Million Dollars. The litigants come from widely separated parts of the country. As stated by this court in the *Guaranty Trust Company* case (p. 111):

"Diversity jurisdiction [in the Federal Courts] is

> founded on *assurance to non-resident litigants of [Federal] courts free from susceptibility to potential local bias.* The Framers of the Constitution, according to Marshall, entertained 'apprehensions' *lest distant suitors be subjected to local bias* in State courts, or, at least, viewed with 'indulgence the possible fears and apprehensions' of such suitors. *Bank of the United States* v. *Deveaux,* 5 Cranch. 61, 87. And so Congress afforded out-of-State litigants another tribunal, not another body of law." (Italics added.)

Petitioners are thus "out-of-State litigants" who are entitled to the protection of the Federal Courts in this case. They believe they will not receive this protection, except at the hands of this Court.

The question here involved is important. If the clear language of the Rules of Decision Act (Section 725 of the Judicial Code) and the rule of this Court enunciated in the *Erie Railway Company* and succeeding cases, requiring the Federal Courts in this case to apply the Texas statutory and trust law, are to be overthrown, it should only be by a square decision by this Court to that effect.

Moreover, the King Ranch trustees are persons of great wealth and prominence. If they can flout the Federal Statutes and the Federal Law as determined by this Honorable Court, as well as the Statutes and Laws of the State of Texas, it will be hard for ordinary litigants to believe that the Federal Courts are doing their duty to see that non-residents of Texas receive fair and impartial justice.

WHEREFORE, petitioners pray that a Writ of Certiorari issued under the Seal of the Court, directed to the United States Circuit Court of Appeals for the Fifth

Circuit, commanding the said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States; and that said final order of said Circuit Court of Appeals be reversed or altered by this Honorable Court. And petitioners also pray for such other, further or different relief as may seem proper.

And these petitioners will ever pray, etc.

Edwin K. Atwood and Alice B. Atwood, *Petitioners,*

By BRADY COLE,
Counsel for Petitioners.

THOMAS H. FISHER,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW

There were no formal opinions in the District Court, although the trial judge filed his "Findings of Fact and Conclusions of Law" in the accounting action (R. 522) and in the settlement proceedings (11717, R. 386). The majority and dissenting opinions of the Circuit Court of Appeals (R. 1003-17) have not yet been reported.

JURISDICTION

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Fifth Circuit on July 2, 1947 (R. 1003), and petition for rehearing was denied on August 21, 1947 (R. 1002). Writs of Certiorari are asked under Section 240 of the Judicial Code (Act of March 3, 1911, c. 231, Section 240, 36 Stat. 1157, as amended February 13, 1925, c. 229, Section 1, 43 Stat. 938).

STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

For a statement of the case and questions presented, see this Petition, pages 1 to 19 above.

SPECIFICATION OF ERRORS.

It is submitted that the Circuit Court of Appeals for the Fifth Circuit erred:

1. In affirming the decree of the District Court.

2. In holding that the testamentary trustees of Mrs.

King's Trust Estate did not breach their trust (a) in paying $300,000 to three of their own number as independent executors on account of so-called "executors' fees"; (b) in expending $451,115.81 and $91,499.40 in making "new improvements" on lands not owned by the Trust Estate, but owned by the trustees and their spouses individually; (c) in paying $1,000,000 or more for the "living expenses" of Mrs. Kleberg and the trustees; (d) in paying $480,855.13 as "rental" to Robert J. Kleberg, Jr.; (e) in purchasing land from Kingsville Land & Investment Company; (f) in making "gifts" and "donations" of trust funds; (g) in failing to collect any part of the indebtedness of $306,209.33 due the Trust Estate from the Estate of Richard King, Sr.; (h) in failing to collect the $196,587 note of Robert J. Kleberg, et al.; (i) in paying the expenses of Kleberg Town & Improvement Company; and (j) in failing to enforce against the other partners the trustees' right of contribution to 90% of the losses to the Trust Estate aggregating $499,101.13 paid with trust funds upon the debts of the Kleberg Bank, a co-partnership, and in other respects.

3. In failing to apply the Texas statutes and Texas law of trusts to the accounting by the trustees and the settlement of Mrs. King's Trust Estate.

4. In not reversing the decrees of the District Court.

ARGUMENT

I.

That the United States District Courts and the United States Circuit Courts of Appeals are required to apply the Texas statutes and the Texas law of trusts to the administration of the Trust Estate created under Mrs. King's Will is now definitely established, not only by the Rule of Decisions Act embodied in Section 725 of the Judicial Code (28 U.S.C.A. 725) and the cases construing that Act, but also by the rule laid down by this Court in *Erie Railway Co.* v. *Tomkins*, 304 U. S. 64, and *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, and the many cases affirming that rule in this Court since those cases were decided in 1938.

For cases holding that the Federal Courts sitting in diversity cases are bound by state statutes, and the decisions of the state courts construing them, we cite: *Brine* v. *Ins. Co.*, 96 U. S. 627; *M. K. & T. Trust Co.* v. *Krumseig*, 172 U. S. 351; *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288; *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276; *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487; *Marine Bank* v. *Kalt-Zimmers Co.*, 293 U. S. 357; *Morhead* v. *New York ex rel. Tipaldo*, 298 U. S. 587; *Russell* v. *Todd*, 309 U. S. 280; *Guaranty Trust Co.* v. *York*, 326 U. S. 99.

Moreover, this Court has now definitely established the further rule that state law, even if not embodied in state statutes, shall be applied to all controversies in diversity cases in the Federal Courts. This is the rule laid down in *Erie Railway Co.* v. *Tomkins*, 304 U. S. 64, and *Ruhlin* v.

New York Life Ins. Co., 304 U. S. 302, and subsequent decisions.

Indeed, this Court has uniformly granted writs of *certiorari* where, as in the case at bar, it appears beyond reasonable doubt that the District and Circuit Courts have failed to apply the state law as embodied in the state court decisions, even though no state statute is involved. We cite: *New York Life Ins. Co.* v. *Jackson*, 304 U. S. 261; *Rosenthal* v. *New York Life Ins. Co.*, 304 U. S. 263; *Hudson* v. *Moonier*, 304 U. S. 397; *Mutual Benefit Health and Accident Assn.* v. *Bowman*, 304 U. S. 549; *Wichita Royalty Co.* v. *City Bank*, 306 U. S. 103; *Texarkana* v. *Arkansas Gas Co.*, 306 U. S. 188; *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208; *Russell* v. *Todd*, 309 U. S. 280; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *West* v. *American T. & T. Co.*, 311 U. S. 223; *Six Co.s of Cal.* v. *Joint Highway Dist. No.* 13, 311 U. S. 180; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464; *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538; *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630; *Klaxon Co.* v. *Stentor Mfg. Co.*, 313 U. S. 487; *Griffin* v. *McCoach*, 313 U. S. 498; *MacGregor* v. *State Mutual Life Ass. Co.*, 315 U. S. 280; *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 238; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *Palmer* v. *Trustees*, 318 U. S. 109; *Clearfield Trust Co.* v. *U. S.*, 318 U. S. 363; *Meredith* v. *Winter Haven*, 320 U. S. 228; *Huddleston* v. *Dwyer*, 328 U. S. 232; *Guaranty Trust Co.* v. *York*, 326 U. S. 99; *Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 549.

In many of the foregoing cases *the sole ground* for the allowance of the writ of *certiorari* was the failure of the Federal Courts to apply the state law, precisely as in the case at bar.

II.

As indicated in the Petition above (p. 3), the Circuit Court's majority opinion appears to be based upon the utterly erroneous doctrine, which was never the law of Texas, that the "burden of proof" in an ordinary accounting action to wind up a trust such as this is upon the beneficiaries (R. 1007-9). The majority opinion even goes farther and states that the beneficiaries must make a showing that there has been "fraud" or "over-reaching" on the part of the trustee (R. 1009). We quote from the Circuit Court's majority opinion (R. 1007):

> "Plaintiffs treated this case below, and they treat it here, as though the mere filing of their [accounting] suit put the trustees in the wrong and on the defensive, put upon them not only the burden of showing what they did in the course of their management of the trust estate and in respect of its partition, but that the plaintiffs' charges were false and unfounded. That this is not so is so well settled as not to require the citation of authority. *The trustees have in their support the general principle that it will be presumed that persons charged with the performance of a duty have discharged it fairly and in accordance with their commission until evidence is introduced which overthrows this presumption.* More than this, the will makes plain the intent and purpose of the testatrix to leave to the discretion of her trustees, except where the will made express provision otherwise, *the time and manner* of the doing of the things she had charged them with doing. Furthermore, the will expressly authorized them, subject only to the limitation that they must not act inconsistently with it, to act, with respect to the terms of the will and the power conveyed, *as though they were the owners of the property* she had conveyed to them in trust. All questions then of the correctness of the accounting and the partition must be approached and examined as though Mrs. King, herself, had made them *under the will,* and they both must be sustained

and approved *unless a showing is made that there has been fraud, over-reaching* or failure to comply with the will's plain terms. In view then of the explicit language of the will, and that all of the others, except plaintiffs, were satisfied with the conduct of the trusteeship and had accepted the partition, *the burden rested on plaintiffs to show that they had been deprived by the trustees of benefits conferred by the will.* In the light of these considerations and of the full and detailed nature of the accounting made by the trustees, we reject appellants' primary claims both as to the partition and the accounting, that plaintiffs were entitled to a decree for failure of defendants to disprove the charges plaintiffs made." (Italics added.)

Under the Texas law of trusts from the earliest times (as well as under the law of all other states), it has been established beyond doubt or question that the burden of proof, in an accounting action such as this to wind up the affairs of a trust estate after its termination, is exclusively upon the trustees and not upon the beneficiaries. *Alexander* v. *Soloman,* 15 S. W. 906; *Maxwell's Unknown Heirs* v. *Bolding,* 36 S. W. (2d) 267; *White* v. *White,* 25 S. W. (2d) 826; *Arnold* v. *Southern Pine Lumber Co.,* 123 S. W. 1162; *Seawell* v. *Greenway,* 22 Tex. 691; *Watson* v. *Dodson,* 143 S. W. 329; *Dodson* v. *Watson,* 220 S. W. 771; *Eaton* v. *Husted,* 172 S. W. (2d) 493. (And the same burden of proof rests upon Texas executors and administrators, as well as trustees. *Cartledge* v. *Billalba,* 154 S. W. (2d) 219; *Scott* v. *Taylor,* 294 S. W. 227.)

The majority opinion of the Circuit Court speaks (R. 1007-8) of the trustees having a presumption in their support that they have performed their trust duties properly "until evidence is introduced which overthrows this presumption."

The only Texas cases in which a "presumption" is indulged in relation to the actions of trustees are cases where the beneficiary seeks to show that certain trust assets have continued to remain in the hands of the trustee who had previously received them up to the time of the trustee's death or insolvency; and in these instances *the presumption is in favor of the beneficiary and against the trustee and his representatives.* *Andrews* v. *Brown*, 10 S. W. (2d) 707; *Spencer* v. *Pettit*, 17 S. W. (2d) 1102; *Continental National Bank* v. *Weems*, 6 S. W. 802; *Eaton* v. *Husted*, 172 S. W. (2d) 493; *Logan* v. *Logan*, 156 S. W. (2d) 507; *Davila* v. *Salas*, 178 S. W. (2d) 294. The same presumption *in the beneficiary's favor* is indulged *against the trustee* who has commingled trust funds with his individually owned assets. *Chanowsky* v. *Friedman*, 108 S. W. (2d) 752; *Grote* v. *Service Finance Corp.*, 119 S. W. (2d) 136; *Moseley* v. *Fikes*, 126 S. W. (2d) 589; *Nettles* v. *First National Bank*, 168 S. W. (2d) 920.

The majority opinion also suggests (R. 1008) that Mrs. King's trustees were authorized by the Will to act "as though they were the owners of the property she had conveyed to them in trust," but concedes that this was subject "to the limitation that they must not act inconsistently with it." The limitation is italicized in the quoted provisions of Section III of the Will in a footnote to the majority opinion (R. 1008). Under Texas law (as under the law of other states), the trustee must become the legal "owner" of the trust property or no trust is created. *Fleck* v. *Baldwin*, 172 S. W. (2d) 975. But such "owner" is subject to all the trust obligations as set forth in the trust instrument, even if no such condition is stated therein as appears in Mrs. King's Will. *Parrish* v. *Looney*, 194 S. W. (2d) 419; *Arnold* v. *Southern Pine Lumber Co.*, 123 S. W. 1162.

Apparently the Circuit Court is of the opinion that the effect of these clauses in Mrs. King's Will is to relieve the trustees of their burden to account. But under the Texas law of trusts (as under the law of other states) a provision purporting to relieve the trustees of this burden is void as against public policy. *Kramer* v. *Sommers*, 93 S. W. (2d) 460.

Moreover, no state is more emphatic than Texas in its application of the general law of trusts that trustees may not directly benefit themselves or their wives or families by their transactions with the trust estate, no matter what exculpatory provisions the trust instrument contains. As stated in the leading case of *Slay* v. *Burnett Trust*, 180 S. W. (2d) 480, 187 S. W. (2d) 387: "It is a well-settled rule that a trustee can make no profit out of his trust," citing *Magruder* v. *Drury*, 235 U. S. 106; *U. S.* v. *Carter*, 217 U. S. 286; *Jackson* v. *Smith*, 254 U. S. 586; *Crites* v. *Prudential Ins. Co.*, 322 U. S. 408, and many Texas and other cases. See also *Kramer* v. *Sommers*, 93 S. W. (2d) 460; *Eaton* v. *Husted*, 172 S. W. (2d) 493.

But even if petitioners had the burden of proving "fraud" or "over-reaching" against the trustees, nevertheless petitioners have shown, in relation to the breaches of trust discussed in their Petition above, that they have sustained even this burden of proof in this case, by quoting and relying exclusively upon the findings of fact made by the Master and confirmed by the trial judge. In other words, petitioners have in truth sustained this very "burden of proof" which the majority opinion of the Circuit Court erroneously casts upon them, in defiance of the Texas law of trusts.

III.

As indicated in the Petition above (pp. 5-6), Mr. Justice Waller's dissenting opinion, in dealing with the $300,000 of so-called "executors' fees," correctly finds that the entire operation and management of Mrs. King's Trust Estate was in the hands of the trustees throughout the trust period (R. 1017). This is but another way of saying that the executors never received or disbursed any funds of Mrs. King's Estate; and in this respect the evidence, as well as the Master's findings as approved by the trial judge (R. 370, 526), completely confirms Mr. Justice Waller.

We have quoted at the foot of this brief Articles 3689 and 3690 of the Texas Revised Civil Statutes, from which it indisputably appears that Texas executors are not entitled to any "executors' fees" *except upon moneys which they may actually receive in cash and may actually disburse in cash "in the course of their administration"* (Article 3689).

Under the facts in this case, since it cannot be disputed that the executors *never did administer Mrs. King's Trust Estate and never did actually receive in cash or disburse in cash any funds in the course of such administration,* it is plain that the trustees were not entitled to pay any moneys to three of their own number as executors, it being held under Texas law that unless the executors can qualify for fees under the Texas statute they are not entitled to any executors' fees. *Dallas Joint-Land Stock Bank* v. *Maxey,* 112 S. W. (2d) 305; *Richardson* v. *McCloskey,* 261 S. W. 801.

Nor can the Texas executors claim any executors' fees upon any cash or other property which the testator had on hand at the time of the decedent's death, or upon any money received from the sale of property or its disbursement "to

the heirs and legatees as such." This is the clear effect of Article 3690 of the Texas Statute. Actually, in the case at bar, the executors never did receive any cash owned by Mrs. King at her death or disburse any cash to the heirs and legatees as such. Indeed, Mr. Justice Waller clearly shows in his dissenting opinion (R. 1017) that the actions performed by the executors were "restricted to probating and recording the Will, filing the inventory and appraisement, and list of claims." It is not surprising that Mr. Justice Waller felt that $300,000 was "greatly excessive in view of the provisions of the Will, the narrowness of their duties, and the compensation received by them as trustees and as employees of the Trust Estate" (R. 1017).

Under Articles 3689-90 of the Texas Revised Civil Statutes, it is a practical impossibility that executors' fees in Texas should ever be a "round amount" such as $300,000, since such fees are invariably based upon a computation of 5% of actual receipts and disbursements by the executors. It is not surprising, therefore, that Mr. Justice Waller was impressed by the fact (R. 1017) that the executors in their sworn Federal estate tax return only "claimed as fees to the executors the sum of $110,394.39," and that "The addition of the sum of $189,605.61 seems to be somewhat of an afterthought."

But it is unnecessary to comment further on this subject, in the light of what is said above. Plainly the Circuit Court has failed to apply the Texas law to this issue, as embodied both in the Texas statutes and in the Texas law of trusts.

IV.

As indicated in the Petition above (p. 8), the trustees expended $451,115.81 for "new improvements" on 30,439.23

acres of land owned by Mrs. Alice G. K. Kleberg, known as the Santa Gertrudis Headquarters Ranch (and on certain adjacent ranch lands owned by the Trust Estate); and $91,499.40 for "new improvements" on lands owned by Robert J. Kleberg, Jr. Neither the Santa Gertrudis Headquarters Ranch nor the lands owned by Robert J. Kleberg, Jr. were owned by the Trust Estate.

It has always been the law of Texas that trustees may not improve their individually owned real properties with trust funds. *Smith* v. *Green*, 243 S. W. 1006; *Miller* v. *Himebaugh*, 153 S. W. 338; *Bush* v. *Gaffney*, 84 S. W. 759; and *Nagle* v. *Von Rosenberg*, 119 S. W. 706. If *Slay* v. *Burnett Trust*, 187 S. W. (2d) 377, is the law of Texas (as enunciated by its Supreme Court in 1945), as must be conclusively presumed in the Federal Courts, then the trustees are liable for these benefits or "profits" received by them from their Trust Estate, regardless of their "good faith" or any powers or provisions contained in Mrs. King's Will.

The District and Circuit Courts failed in this case to apply the law of Texas to these breaches of trust.

V.

As indicated in the Petition above (p. 9), the trustees paid the "living expenses" of Mrs. Alice G. K. Kleberg and part of the "living expenses" of three of the trustees, and their respective families, servants, guests and friends, and charged the same to expense accounts from which these "living expenses" could not be "segregated," totaling more than $1,000,000.

Under the Texas law of trusts as confirmed in *Slay* v. *Burnett*, 187 S. W. (2d) 377, the trustees are liable for these benefits or profits received by them, regardless of their

good faith or any of their powers granted them under the Will.

In so far as the trustees failed to segregate these improper disbursements for living expenses, under Texas law of trusts the trustees are held liable for the total of such accounts to which the improper disbursements have been charged from which they cannot be segregated. *White* v. *White,* 25 S. W. (2d) 826; *Maxwell's Unknown Heirs* v. *Bolding,* 36 S. W. (2d) 267; *Alexander* v. *Soloman,* 15 S. W. 906; *Dodson* v. *Watson,* 220 S. W. 771. The latter case holds that all doubts on an accounting are to be resolved against the trustees. See also *Arnold* v. *Southern Pine Lumber Co.,* 123 S. W. 1162, and *Watson* v. *Dodson,* 143 S. W. 329, holding that trustees owe the duty to their beneficiaries to render a fully detailed and explanatory account of their receipts and disbursements, as well as of the property on hand at the end of the trust.

It is perhaps worth noting that the Master also found (R. 365) and the trial court confirmed (R. 526) that Robert J. Kleberg, Jr. repaid to the Trust Estate "one-half of the cost of the food and wages of servants employed" by him. This constituted an admission by one of the trustees that he was not entitled to receive all of his living expenses, on top of all of the other compensation which he received from the Trust Estate.

The District and Circuit Courts failed to apply the trust law of Texas to these breaches of trust.

VI.

As indicated in the Petition above (p. 11), the trustees paid $480,855.13 from trust funds to Robert J. Kleberg, Jr. as "rental" on lands owned by him. Part of this

rent was claimed by the trustees to be paid under a written lease between Mrs. King and Robert J. Kleberg, Jr. which expired on June 30, 1934; but the Master three times found (R. 385-6, 389) and the trial judge confirmed (R. 526, 530) that it was the trustees and not Mrs. King who had leased the Encino Ranch from Robert J. Kleberg, Jr. In any event, it was undenied that there was no written lease on the Stillman Ranch; and there was no written lease on the Encino Ranch during the last nine months of the trust period, during which the trustees paid Robert J. Kleberg, Jr. the sum of $36,536.06 as alleged "rental" thereon.

Under Articles 1288 and 3995 of the Texas Revised Civil Statutes, oral leases of lands for more than one year are not enforcible. The Texas cases fully sustain this interpretation of the statute. *Dority* v. *Dority*, 71 S. W. 951; *Vaughn* v. *Pearce*, 153 S. W. 171; *Hooks* v. *Bridgewater*, 229 S. W. 1114; *Ward* v. *Etier*, 251 S. W. 1028; *Long* v. *Collins*, 12 S. W. (2d) 252; *Clark* v. *Jones*, 164 S. W. (2d) 62.

Moreover, under the Texas law of trusts, trustees may not lease the privately owned lands of themselves or their families at a rental "profit" to themselves without breaching their trust especially where, as in the case of Mrs. King's Will, there is no power in the Will permitting the trustees to lease the lands of others. *Dial* v. *Dial*, 21 Tex. 529; *Merriman* v. *Russell*, 39 Tex. 278; *Ingenhuett* v. *Hunt*, 39 S. W. 310; *Nagle* v. *Von Rosenberg*, 119 S. W. 706; *Miller* v. *Himebaugh*, 153 S. W. 338; *D. Sullivan & Co.*, v. *Ramsey*, 155 S. W. 580; *Witherspoon-McMullen Co.* v. *North Texas Trust Co.*, 212 S. W. 278; *Murphy-Bolanz Land & Loan Co.* v. *McKibbon*, 236 S. W. 78; *Graham* v. *Oakes*, 32 S. W. (2d) 916; *McMullen* v. *Sims*, 37 S. W. (2d) 141. All of these cases are similar instances in which the Texas courts have affirmed the doctrine of *Slay* v. *Burnett Trust*,

187 S. W. (2d) 377. The District and Circuit Courts failed to apply the Texas law to these breaches of trust.

VII.

As indicated in the Petition above (p. 12), the trustees purchased real property from Kingsville Land and Investment Company, a Texas corporation, whose entire capital stock was owned by two of the trustees.

This Court will find Article 7425 b-12, of the Texas Revised Civil Statutes in the Appendix to this Brief. It is there provided that Texas trustees may not purchase their individually owned properties, nor enter into any such transaction in which they have a personal interest. This is a codification in 1945 of the earlier Texas law of trusts. *Daniel* v. *Henderson*, 183 S. W. (2d) 242.

Moreover, under the Texas law of trusts trustees may not purchase real property from themselves or from any corporation already owned or controlled by them without thereby breaching their trust. *DeEverett* v. *Henry*, 3 S. W. 566; *Gaston & Thomas* v. *Dashiell*, 55 Tex. 508; *Sullivan* v. *Fant*, 160 S. W. 612.

The District and Circuit Courts failed to apply the Texas statutes and trust law to this breach of trust.

VIII.

As indicated in the Petition above (p. 13), the trustees made charitable, political and wedding gifts of trust funds, including political contributions to elect their chosen candidates as governors of Texas and to defeat the election of President Hoover. They also paid one of their own number, Robert J. Kleberg, Jr., a "wedding present" of $2,500 out of trust funds.

It is unnecessary to cite more than the case of *Slay* v. *Burnett Trust,* 187 S. W. (2d) 377, and cases therein cited, to establish that the District and Circuit Courts have failed to apply the Texas law of trusts to these "donations" and "gifts," which constituted breaches of trust under Mrs. King's Will.

IX.

As indicated in the Petition above (p. 14), the trustees failed to collect the indebtedness of $306,209.33 due Mrs. King and her Trust Estate from the Estate of Richard King, Sr.

Under the Texas law of trusts, it is a breach of trust for trustees not to collect all claims due the Trust Estate. This is especially true of all indebtedness which is due from one of the trustees or which is collectible from property held by one of the trustees. *Hemman* v. *Hemman,* 251 S. W. 313.

The District and Circuit Courts failed to apply the Texas law of trusts to this breach of trust.

X.

As indicated in the Petition above (p. 17), the trustees failed to collect 90% of the sum of $499,101.13 which the trustees paid from trust funds to make good the losses of the Kleberg Bank partnership, in which Mrs. King and her Trust Estate had only a 10% interest. The Master found that three of the trustees, who were co-partners with Mrs. King at the time of her death and at the time the losses occurred, were liable for their share of these losses, and that recovery could have been had from them, but that the trustees failed to secure any contribution either from

themselves or from any of the other members of the partnership.

Under the Texas law of partnership, the death of a partner (Mrs. King) terminates the partnership. *Altgelt* v. *Alamo Natl. Bank*, 98 Tex. 252. (Under Paragraph 14, the Articles of Partnership of Kleberg Bank likewise provided that the death of any partner should terminate the partnership) (Pl. Ex. 64; Def. Ex. 41). And under Texas partnership law, as well as under the partnership articles, Mrs. King's trustees were entitled to contribution for 90% of all partnership losses paid by them, from the other partners. *Fowler Commission Co.* v. *Charles Land & Co.*, 248 S. W. 314; *Chalk* v. *Collier*, 208 S. W. 972.

The trustees of Mrs. King's Trust Estate, however, made no effort to liquidate Mrs. King's interest in the partnership, but continued to operate the partnership for the next 9-1/2 years after her death, during which period they and the other partners borrowed $832,030.52 on their personal loans from the Bank, which loans caused the Bank's insolvency in November, 1934.

Under the Texas law of trusts above cited, it is plain that the trustees breached their trust in failing to collect 90% of the loss suffered by Mrs. King's Trust Estate of $499,101.13, under their right of contribution from the 90% holders of the other partnership interests in the partnership.

The District and Circuit Courts failed to apply the Texas law of trusts to this breach of trust.

For other breaches of trust under the Texas law of trusts see the Petition for Rehearing filed in the Circuit Court (R. 1019-1101).

CONCLUSION

We conclude, therefore, that the District and Circuit Courts in this case have failed to apply the Texas statutes and the Texas law of trusts to the breaches of trust by the trustees of Mrs. King's Trust Estate, and that such failure is in contravention of the Federal Rules of Decision Act embodied in Section 725 of the Judicial Code and the many decisions of this Court requiring the Federal Courts to apply the state statutes and state law to diversity cases.

Moreover, we submit that under Rule 38 (5) (b) of this Court, a writ of *certiorari* should properly be granted, in view of the plain violation of the state statutes and state law by the District and Circuit Courts in this case.

We particularly feel that this Court should grant *certiorari* in this case in the light of the dissenting opinion of Mr. Justice Waller, which shows that he disapproved of the trustees' accounts on an item of $300,000 of so-called "executors' fees." Both he and the majority members of the Circuit Court apparently failed to give due consideration to, and on the contrary wholly ignored, the Texas Civil Revised Statutes which, we submit, should have absolutely precluded an affirmance of the decree in the trial court.

Respectfully submitted,

BRADY COLE,
Counsel for Petitioners.

Thomas H. Fisher,
Of Counsel.

APPENDIX.

Texas Revised Civil Statutes.

"**Article 3689. Commission.**—Executors and administrators shall be entitled to receive and may retain in their hands five per cent on all sums they may actually receive in cash, and the same per cent on all sums they may pay out in cash in the course of their administration. [Acts 1876, p. 126; G. L. Vol. 8, p. 961.]

"**Art. 3690. No commissions.**—A commission shall not be allowed or received for receiving any cash which was on hand at the time of the death of the testator or intestate, nor a commission for receiving money realized from the sale of property to satisfy debts against the property and the paying out of the proceeds in satisfaction of the debt except as to the amount realized from the sale in excess of the debt, nor for paying out money to the heirs or legatees as such. Provided, however, that if the administrator or executor shows to the court that the value of the services rendered the estate in making a sale of property securing a debt exceeds the amount of the commission calculated as above provided, then the court shall allow a commission for a just amount. The amount not to exceed that now allowed by law. (Acts 1876, p. 126; G. L. vol. 8, p. 961; Acts 1931, 42nd Leg., p. 390, ch. 235, § 1.)"

"**Article 1288. Instrument of conveyance.**—No estate of inheritance or freehold, or for a term of more than one year, in lands and tenements, shall be conveyed from one

to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereunto authorized by writing. [Act Feb. 5, 1840; P. D. 671; G. L. vol. 2, p. 327.]"

"**Art. 3995. Writing required.**—No action shall be brought in any court in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized:

• • •

"4. Upon any contract for the sale of real estate or the lease thereof for a longer term than one year; or,

"5. Upon any agreement which is not to be performed within the space of one year from the making thereof. [Acts 1840, p. 28; P. D. 3875; G. L. vol. 2, p. 202.]"

"**Art. 7425b-12. Trustee buying from or selling to self.** A trustee shall not buy nor sell, either directly or indirectly, any property owned by or belonging to the trust estate, from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee, or of an affiliate; or from or to himself, a relative, employer, partner or other business associate; provided a national banking association, or a state chartered bank and trust company, or a state chartered trust company, or a state chartered bank having trust powers, or any other state chartered corporation having the right to exercise trust powers, when acting or serving as executor, administrator, guardian, trustee, or receiver, may sell shares of the capital stock of itself so owned or held by itself, for any estate,

to one or more of its officers, stockholders or directors, upon a court of competent jurisdiction finding that any such sale will be to the best interest of the estate owning such shares; fixing or approving the price to be paid therefor, and the terms of sale, and upon entering an order, decree or judgment, authorizing, approving and directing such sale to be made; and provided further that a corporate trustee, executor, administrator, or guardian, when authorized by will, trust agreement, other trust instrument, or judicial order, to retain its own capital stock in trust, may exercise rights to purchase its own stock when increases in its capital stock are offered pro rata to stockholders; provided, moreover, that such exercise of rights, in the circumstances then prevailing, shall be consistent with the judgment and care which men of ordinary prudence exercise in the management of their own affairs. As amended Acts 1945, 49th Leg., p. 109, ch. 77, §4."

"**Art. 3716. In actions by or against executors, etc.**—In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent. [Id. P. D. 6827.]"

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DEC 17
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. 443, 444, AND 445

EDWIN K. ATWOOD and ALICE B. ATWOOD,
Petitioners,

vs.

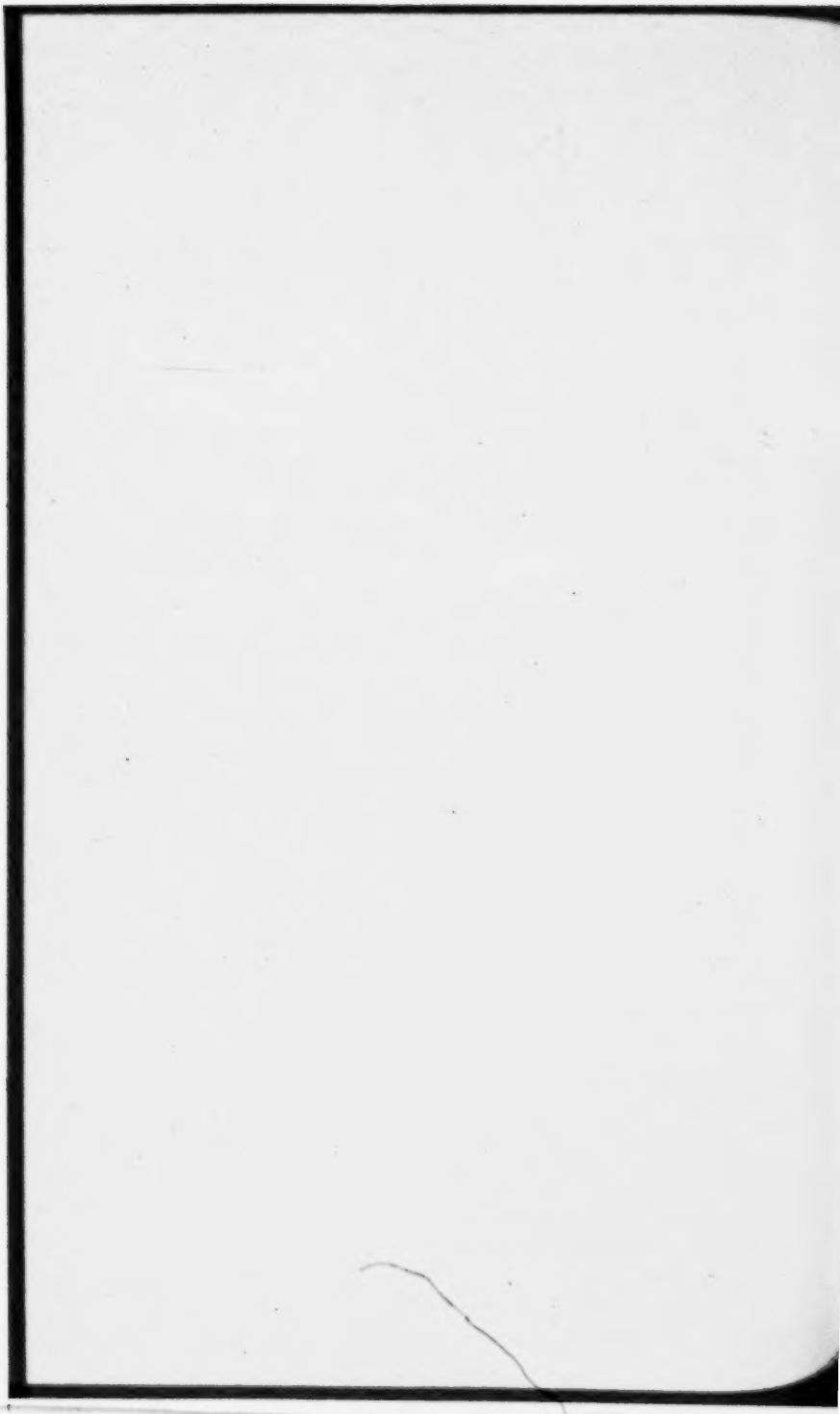
ROBERT J. KLEBERG, JR., CAESAR KLEBERG, RICHARD MIFFLIN KLEBERG, JOHN D. FINNEGAN, SAMUEL G. RAGLAND and RICHARD KING, JR., individually and as Trustees under the Last Will and Testament of Henrietta M. King, Deceased, et al.,
Respondents.

PETITIONERS' REPLY BRIEF.

BRADY COLE,
Counsel for Petitioners.

THOMAS H. FISHER,
Of Counsel.

U.S. LAW PRINTING CO., PHONE LAKEVIEW 6881, CHICAGO, ILLINOIS



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Respondents.

PETITIONERS' REPLY BRIEF.

We submit that respondents' Brief in effect admits that writs of certiorari should issue in this case

The continued statements that the issues are "principally questions of fact," that "very few legal questions raised by Petitioners actually arose," and that the facts as we have stated them are "contrary" to the facts as found by

the Master and the trial court are nothing but the well-worn effort to make this Court feel that this is a "fact" case and not a "law" case. The true situation is exactly the opposite, as we show below. If ever there were a case based squarely upon established and admitted facts and raising issues of law, it is this case.

I.

The trustees paid $300,000 to three of their own number as "Executors' Fees."

Respondents admit that *the executors* neither received nor disbursed any of the funds of Mrs. King's estate, exactly as the Master found (R. 356), the trial judge confirmed (R. 526), and Mr. Justice Waller of the Circuit Court of Appeals likewise confirmed (R. 1017).

Respondents also admit that under Articles 3689-90 of the Revised Statutes of Texas, the executors were not entitled to any executors' fees *if they did not receive or disburse any funds.*

It follows that writs of certiorari should issue as prayed, for failure of the Circuit Court of Appeals to apply Articles 3689-90 of the Revised Texas Statutes to the unlawful payment of $300,000 to three of the trustees themselves as executors' fees in this case, in plain violation of the Texas statutes.

Respondents say (p. 4) that the executors neither relinquished nor abandoned their "authority," but continued to act in said capacity throughout the trust, particularly (p. 5) in executing promissory notes and other documents in their *joint* capacity as executors and trustees. But they do not deny that Mr. Justice Waller correctly found, as

the Master and the trial judge had before him, that: *"The operation and management of the estate was entirely in the hands of the trustees"* (R. 1017), so that *the executors neither received nor disbursed any of the funds of the estate.*

Respondents also say (p. 8) that "the compensation of *the fiduciaries"* was "reasonable", and (p. 9) that the executors' 5% commissions would be applicable not only upon "actual cash receipts," but also upon "constructive receipts," an issue which is irrelevant here. Revised Statutes of Texas, Articles 3689-90, *do not permit payment of "reasonable compensation" to executors;* and the only receipts, as well as disbursements, upon which the 5% executors' commissions can properly be applied are the actual (or constructive) receipts and disbursements *of the executors,* and *not* of the trustees.

We submit that respondents have conceded that Articles 3689-90 of the Revised Statutes of Texas have *not* been applied by the Circuit Court of Appeals, or by the trial court, to the allowance of the $300,000 of executors' fees, and that writs of certiorari should issue to correct this error of the Circuit Court of Appeals and the District Court.

II.

The trustees expended $451,115.81 for "new improvements" on Mrs. Kleberg's lands, and $91,491.40 for "new improvements" on Robert J. Kleberg, Jr.'s lands.

Respondents admit, and indeed positively state (p. 11), that the trustees placed "new improvements" (costing the Trust Estate over $540,000) *on lands not owned by the Trust Estate.*

Respondents do not deny that under Texas law the trustees breached their trust by making "new improvements" *on lands not owned by the Trust Estate.*

The writs of certiorari should issue accordingly, for failure of the Circuit Court of Appeals to apply the Texas law of trusts to these huge and unlawful expenditures.

Respondents refer (p. 10) to the trustees' powers under the Will "to keep up and make all necessary improvements" *on the lands owned by the Trust Estate;* and they say that the combined cost of improving both (1) the lands owned by the Trust Estate, and (2) the lands *not* owned by the Trust Estate "amounted to only a small sum per acre per year." They also say (p. 11) that the costs of "repairs" upon improvements were reasonable, and that the "new improvements" on the lands *not* owned by the Trust Estate offset the depreciation on the existing improvements owned by others on the lands *not* owned by the Trust Estate.

These matters are wholly irrelevant to the admitted fact (p. 11), as found by the Master (R. 386) and confirmed by the trial judge (R. 526-531), that the trustees expended $451,115.81 for "new improvements" *on Mrs. Kleberg's lands* and $91,499.40 for "new improvements" *on Robert J. Kleberg, Jr.'s lands,* none of which lands were owned by the Trust Estate, *in plain violation of the Texas law of trusts.*

Writs of certiorari should issue to correct this error of the Circuit Court of Appeals and the District Court accordingly.

III.

The trustees paid the "living expenses" of Mrs. Alice G. K. Kleberg, her family, servants, guests, and friends from the trust estate.

Respondents admit (p. 12-5) that the trustees paid all of the "living expenses" of Mrs. Alice G. K. Kleberg, and all or part of the "living expenses" of three of the trustees, Richard M. Kleberg, Richard King, and Robert M. Kleberg, Jr., and their respective families, servants, guests and friends, while all of them were living in their own homes on their own or Mrs. Kleberg's real estate.

This constituted *a plain breach of the Texas law of trusts* and warrants the issuance of the writs of certiorari.

Respondents also admit (p. 13) that these "living expenses" were charged to accounts on the trustees' books exceeding One Million Dollars, and that "it is impossible to segregate these items" therefrom. They also admit that under Texas law trustees are liable for the total of such accounts, to which the improper disbursements have been charged, but from which they cannot now be segregated.

They make the extraordinary argument (p. 14) that it would not be "logical" to charge an officer of the United States Army "with the entire cost of the War" or "to charge a Pullman conductor with the cost of operating a train." But there is no obligation upon Army officers or Pullman conductors *to account to their beneficiaries, such as rests upon trustees, which is the sole issue in this case.*

Respondents argue (pp. 14-15) that "employees" of the

Trust Estate may be paid "partly in cash and partly in housing and meals for themselves and their families." But Mrs. Alice G. K. Kleberg was *not an "employee"* of the trustees or the Trust Estate. Nor were the family, servants, guests and friends, either of Mrs. Kleberg or of the three trustees living in their own homes on their own property, such "employees." And respondents also admit (p. 15) that one of the trustees (Richard M. Kleberg) finally reimbursed the Trust Estate at partition with the "house allowance," plus 6% annual interest, improperly paid him from the Trust Estate while living "in Corpus Christi in his own home", *thus conceding the impropriety of the payment of the trustees' "living expenses."*

The writs of certiorari should accordingly issue to correct this error of the Circuit Court of Appeals and the trial court in this case.

IV.

The trustees paid $480,855.13 to Robert J. Kleberg, Jr., as "rental" on lands owned by him.

Respondents admit that the trustees paid so-called "rentals" totaling $480,855.13 to Robert J. Kleberg, Jr., one of the trustees, on the Encino and Stillman Ranches owned by him; and they admit that the trustees had no written lease whatsoever on the Stillman Ranch, comprising 34,934 acres (R. 368), during the ten-year trust period, and no written lease upon the Encino Ranch, comprising 107,030 acres (R. 367), during the last nine months of the trust period. Respondents also admit that "oral leases" of lands are unenforcible under Articles 1288 and 3995 of Revised Statutes of Texas.

Respondents also admit that the trustees paid $120,000 as "rental" to Mrs. Alice G. K. Kleberg during the ten-year trust period upon a lease which covered and included the Palo Alto Farms, comprising 8,111.9 acres of immensely valuable farming land which had been sold *prior to Mrs. King's death* and the proceeds of sale used to purchase *the very same Encino and Stillman Ranches,* upon which the trustees *also* paid Robert J. Kleberg $480,855.13 as alleged "rentals" during the trust period. Thus respondents admit that the trustees paid "double" rental (1) of $480,855.13 to Robert J. Kleberg, Jr. upon the Encino and Stillman Ranches, and also (2) of $120,000 to his mother, Mrs. Kleberg, upon the Palo Alto Farms *for which the Encino and Stillman Ranches were substituted before Mrs. King died.*

This constituted a plain breach of the Texas law of trusts, and warrants the issue of the writs of certiorari as prayed.

Respondents argue (pp. 16-17) that the Master found (Appendix 14; R. 367) that the Encino Ranch (not the Stillman Ranch) was under a written lease, made to Mrs. King before her death, from July 1, 1924 to June 30, 1934. Even if true, this would merely cut down the large liability of the trustees for paying "rentals" on the Stillman Ranch and on the Encino Ranch after the written lease expired in 1934. But respondents ignore *the three contradictory findings by the Master* that "The Encino and Stillman Ranches were leased *by the estate* from Robert J. Kleberg, Jr." (R. 385), that the Encino and Stillman Ranches "were leased *by the estate*" (R. 386), and that the Encino and Stillman Ranches were leased to "the estate" by Robert J. Kleberg, Jr., trustee (R. 389). Respondents also ignore the definite finding by the trial judge that "the renting"

of the Encino and Stillman Ranches was *"by the trustees as found by the Special Master"* (R. 530).

Moreover, respondents ignore completely the "double renting" of the Palo Alto Farms and the substituted Encino and Stillman Ranches, under which Robert J. Kleberg, Jr. received $480,855.13 from the Trust Estate *for the very same* (*substituted*) *property* for the leasing of which his mother, Mrs. Kleberg, also received $120,000 of so-called "rental" from the Trust Estate.

The writs of certiorari should accordingly issue to correct this error of the Circuit Court of Appeals and the District Court in his case.

We might add that, *just taking the four prior errors alone,* the cost to the Trust Estate was over $3,230,000. Petitioners (non-residents of the State of Texas) are entitled to ask this Court to compel the Circuit Court of Appeals and the District Court in Texas to do them justice by applying the statutes and laws of Texas to the foregoing errors, in accordance with the Federal Rules of Decision Act and the many decisions of this Honorable Court.

V.

The trustees purchased real property from a corporation wholly owned by Two Trustees.

Respondents admit that two trustees, Robert J. Kleberg and Caesar Kleberg, owned *the entire capital stock* of Kingsville Land & Investment Company and that the Master found (R. 369, 413), and the trial court confirmed (R. 526), that the trustees purchased the "Kimmel Farm" for $13,904.27 *from that company.* Respondents also admit that under Article 7425-b (12) of the Revised Statutes of

Texas, which was not enacted until 1945 *but which codified the prior Texas law of trusts,* the purchase of the Kimmel Farm from Kingsville Land & Investment Company was a breach of trust.

The writs of certiorari should issue accordingly.

Respondents argue (p. 19) that "in the Trial Court" petitioners "contended" that the Kimmel Farm was purchased from, rather than through, Robert J. Kleberg, Jr., personally. Respondents also argue (p. 20) that "in the Circuit Court of Appeals the Petitioners claimed that a small part of the purchase price went to the Kingsville Land & Investment Company in payment of a small lien" on the Kimmel Farm, and that "the stock of Kingsville Land & Investment Company belonged . . . partly to the Estate of one Charles H. Flato, then deceased." *Petitioners made no such contention in the Circuit Court of Appeals,* and neither statement is true. We quote from petitioners' Brief in the Circuit Court of Appeals (p. 127):

> "Journal Entry 729 dated July 31, 1933 (Pl. Ex. C(1), pp. 109, 134) shows that the trustees purchased the Kimmel Farm for $13,904.27, *of which the entire cash payment of* $8,571.89 *was paid directly to Kingsville Land & Investment Company* . . .
>
> "The Master further found (R. 413) that Kingsville Land & Investment Company was a Texas corporation, *the entire stock of which 'was owned by Robert J. Kleberg and Caesar Kleberg' (two of Mrs. King's Trustees).* . . . The issue is whether the Trustees may purchase lands for their Trust Estate *from themselves or from a corporation owned by them.*"

Respondents also make the flat statement (p. 21) that "There was no purchase made from the Kingsville Land & Investment Company as here alleged. It is here, *in the*

Supreme Court, for the first time that they [petitioners] allege that any land was ever purchased from the Kingsville Land & Investment Company by the Trustees."

This is absolutely erroneous, as the foregoing quotation from petitioners' Brief in the Circuit Court of Appeals, supported by the Master's finding, conclusively proves.

Respondents also state incorrectly (p. 21) that "the owner of this property paid *a small part* of the consideration to the Kingsville Land & Investment Company *to discharge its lien on the property*", and that "Mr. Kleberg's estate, *et al.*, held *some stock*" in the company which was in truth wholly owned by the two trustees. Both statements are flatly refuted by the Master's findings (R. 369, 413), as confirmed by the trial court (R. 526).

The writs of certiorari should accordingly issue to correct this error of the Circuit Court of Appeals and of the District Court in this case.

VI.

The trustees made charitable, political and wedding gifts of trust funds.

Respondents admit (p. 22) that the trial judge found (R. 531) that "donations" of $6,500 and $5,000 had been made to the Treasurer of the Presbyterian Church South of the City of Brownsville "in lieu of" the two city lots devised under Mrs. King's Will to the Congregation of that Church, but which devise was adeemed by sale of the lots before her death (R. 34).

Respondents claim that these "donations" were paid *by the executors*, rather than *by the trustees* of Mrs. King's

estate, upon some kind of a "claim" by the Church; and that the executors had "peculiarly" the jurisdiction to make such "donations" because there is "no question of good faith in the transaction" and because the Federal Court has no "probate jurisdiction" *over the executors.*

There is *no foundation* for the statement that *the executors rather than the trustees* made the "donations" of $6,500 and $5,000 "in lieu of" the amended devise.

The trustees themselves prepared and submitted Plaintiffs' Exhibit B(1), page 239, which they describe (p. 51) as "an audit of the books of the [Trust] Estate for the trust period," from which it plainly appears that on August 19, 1926 *the trustees* (*not* the executors) paid $11,500 to the Presbyterian Church South "By specific bequest of the Will of Henrietta M. King, Deceased." Moreover, the actual Voucher No. 2493 dated August 19, 1926 for the sum of $11,500, *which was drawn and paid by the trustees* (*not* the executors) to the order of T. H. Dennis, Treasurer, was similarly endorsed with the entry: "By specific bequest of will of H. M. King, Deceased" (R. 657). And finally, *the trustees'* (*not* the executors') Federal income tax return for 1926 contains the entry: "RECONCILIATION PROFIT & LOSS Year Ending 12-31-26—Special Expense—$17,500," *which sum included the* $11,500 *here involved* (together with $6,000 properly paid to the Treasurer of the Church on the same date under Article Third of Mrs. King's Will (R. 34-5), as shown by Plaintiffs' Exhibit B(2), p. 239).

The statement by respondents, therefore, that the $11,500 of "donations", which were paid "in lieu of" an adeemed devise, were made *by the executors instead of by the trustees* is flatly contradicted by the trustees' own accounts and by the trustees' own Federal income tax return for 1926, the year in which the "donations" were made.

Respondents admit (p. 23) that the trustees donated $6,729.30 to elect Governor Sterling and Governor Small, and to defeat the election of President Hoover. Without attempting *any justification whatever* for their contributions to the National Democratic Committee to elect the Texas governors, respondents nevertheless attempt to justify their political "donation" to defeat President Hoover's re-election because of their belief that his policies "resulted in the terrible collapse of the agricultural and livestock values in which a majority of the agricultural operators in the country failed."

On such a theory as this, every trust estate in the United States could be expended in electing or opposing political candidates for public office.

Respondents make a very weak attempt (pp. 24-5) to pretend that the $2,500 wedding gift made by the trustees to Robert J. Kleberg, Jr., at the time of his marriage, was not actually a wedding present but was made "in view of the fact that he was *assuming the responsibility of marriage*" and "*felt* that he should be paid a salary *more fitting* to the value of his services." But Voucher 1840 dated April 7, 1926 (practically the date of Robert J. Kleberg's marriage), offered in evidence as Plaintiff's Exhibit 218 (R. 661), *shows on its face* that the $2,500 was paid by the trustees to Robert J. Kleberg, Jr. as a "gift" and that it was charged on the trustees' books as a "Donation." Moreover, Richard King, a trustee, testified that he and Caesar Kleberg, another trustee, made this "wedding present" to Robert J. Kleberg, Jr., a trustee, at the time of his marriage because Mrs. King had been in the habit during her lifetime of making cash gifts to members of her family at the time they married (Master's R. 7209, 8207). Richard M. Kleberg, another trustee, admitted in his sworn testi-

mony that the $2,500 was a wedding "gift" (Master's R. 9229-30).

Respondents claim (p. 25-6) that the trustees have an "offset" for their liability for making "donations" of trust property, even though they have "not pleaded it," and even though they are "*guilty of wilful default,*" citing *Smith* v. *Belding*, 237 S. W. 246. The *Smith* case makes no such holding, the issue of bad faith being in no way involved in that case.

Respondents having necessarily admitted that gifts or donations by trustees of the funds of the Trust Estate were in violation of the Texas law of trusts, the writs of certiorari should issue accordingly.

VII.

The trustees failed to collect the indebtedness of Richard King, Sr. to the trust estate aggregating $306,209.33.

Respondents admit that the Master correctly found (R. 423, 467), and the trial court confirmed (R. 526), that the Estate of Richard King, Sr. was justly indebted to the Trust Estate on his promissory notes payable to the order of Mrs. King for $21,000 and on an open account of $285,209.33, or a total indebtedness of $306,209.33, and that no part of this sum was collected by the trustees from Richard King, Sr.'s descendants.

An elaborate argument is made (pp. 28-35) to the effect that Mrs. King intended to cancel this indebtedness in her Will. The clause relied upon is Article Sixth (R. 36), in which Mrs. King said that her son Richard King, Sr. had "*already received* from the estate of my late husband and myself . . . a large and valuable property" and "from time

to time, sums of money, property and benefits, to a very large amount", and that she therefore gave him additional property under the Will which, "with the property, real and personal, money and benefits *already received and enjoyed by him, as above mentioned, will,* in my opinion and judgment, be just to him and to his sisters and their descendants." The argument is made that this language *cancelled* the $306,209.33 owed by Richard King, Sr. to Mrs. King at her death upon his notes and accounts receivable; and numerous cases are cited (pp. 31-3) which are said to contain "similar language" to Mrs. King's Will.

All of this argument is a mere after-thought; for not only did the trustees set up the indebtedness of Richard King, Sr. at Mrs. King's death and carry it for ten years thereafter on the trustees' books *as an asset of the Trust Estate* (Pl. Ex. B(1), p, 72; Pl. C(1), p. 29), but these entries conclusively show that *the entire indebtedness arose after Mrs. King's Will was made on July* 5, 1918 (R. 60) *and prior to her death on March* 31, 1925. In other words, Mrs. King, in drawing her Will on July 5, 1918 and in referring to her and Captain King's *past gifts* to Richard King, Sr., could not conceivably have been referring to a future indebtedness which Richard King, Sr. *later incurred to her,* and which she herself showed she intended to collect by taking his notes receivable for $21,000 and by entering up the balance of his indebtedness as an account receivable on her own books of account. Mrs. King also procured from Richard King, Sr., in his lifetime a written instrument (Pl. Ex. 650) in the form of a waiver and release of *any future claim* of Richard King, Sr., in her estate, which instrument she duly recorded in Kleberg County, Texas, as the exhibit shows. Moreover, an examination of the cases cited will show that there is not the slightest similarity between the language of Mrs. King's Will and the language of the wills construed in those cases.

In the Circuit Court of Appeals the trustees attempted a wholly different justification for their failure to collect the $306,209.33 of notes and accounts receivable due from Richard King, Sr. which the trustees themselves placed and kept upon their books as assets of the Trust Estate.

It is noteworthy that the Circuit Court of Appeals ignored their plain duty and made no effort to consider or justify the failure of the trustees to collect $306,209.33 admittedly due from Richard King, Sr. to the Trust Estate.

The writs of certiorari should issue to compel the Circuit Court of Appeals, upon remanding of this case, to construe the Will and correct the error accordingly.

VIII.

The trustees failed to collect the note receivable of Robert J. Kleberg, Sr. and others for $196,587 held by the trust estate.

Respondents admit that the trustees failed to collect the promissory note of $196,587 payable to Mrs. King and signed by Robert J. Kleberg and others, which also was duly recorded on the trustees' books as an asset of the Trust Estate (Pl. Ex. 122; Pl. Ex. B(1), p. 41-2). Respondents also admit that the only evidence to defeat the liability of Robert J. Kleberg, *et al.*, on this promissory note, payable to the order of Mrs. King and forming a part of the assets of her Trust Estate, was *oral testimony* that Robert J. Kleberg, *et al.* signed the note as "accommodation makers" and with "the express [oral] understanding that they would not be liable thereon."

Respondents cite various Texas cases (pp. 39-40) to support their construction of the "Texas Dead Man's Statute" (Article 3716, Revised Statutes of Texas) as not applicable to actions by or against trustees, as distinguished from "executors, administrators, or guardians."

But an examination of Article 3716 (our Petition, page 42) will show that it not only applies to "actions by or against executors, administrators or guardians," but that it also applies to "*all actions by* or against *the heirs* or legal representatives *of a decedent arising out of any transaction with such decedent.*" Clearly, this is "an action by the heirs of a decedent (the Atwoods are the heirs of Mrs. King) arising out of a transaction with such decedent." Respondents maintain (p. 38) that *Caffey's Executors* v. *Caffey*, 35 S. W. 738, holds "that the statute did not extend to suits against trustees," and therefore "the [oral] testimony as to *transactions with the deceased* was admissible." An examination of that case will show that the oral testimony did not concern "any transaction with such decedent," but merely described "what was separate and what was community property." Nor is the case of *Tennison* v. *Palmer*, 142 S. W. 948, in point, for respondents themselves claim, (p. 7-8) that the trustees were still acting in their capacities as executors when this action was brought.

Respondents also maintain (p. 40) that oral testimony is proper because this is a suit between "strangers to the instrument." But the "Texas Dead Man's Statute" contains no such exception; and it is the Texas statute upon which petitioners rely.

The writs of certiorari should issue for failure of the Circuit Court of Appeals to hold the trustees fully liable for their failure to collect the promissory note for $196,587 *signed by one of the trustees themselves* (*Robert J. Kleberg*).

IX.

The trustees paid the operation expenses of and purchased property from Kleberg Town and Improvement Company, a Corporation, one-half of whose stock was owned by Alice G. K. Kleberg.

Respondents admit that the trustees paid all of the rent and telephone charges aggregating $42,273,39 of Kleberg Town and Improvement Company, a Texas corporation, and that they also purchased the "Worrell House" from that company. They also admit that Mrs. Alice G. K. Kleberg owned one-half of the entire stock of the company.

Under these admitted facts, the writs of certiorari should issue, for such expenditures of trust funds are plain violations of the Texas law of trusts.

Respondents argue (p. 42) that the trustees got the benefit of *a large portion* of the telephone services, as well as *the use* of the rented space and certain furniture and fixtures of the Kleberg Town and Improvement Company. This is true; but it is no defense to the trustees' liability for breach of the Texas law of trusts that the trustees got some benefit from the trust funds misapplied by them from the Trust Estate. If the trustees should be able to segregate that portion of the expenses of Kleberg Town and Improvement Company properly chargeable to the Trust Estate and paid by them, then the trustees would be entitled to an offset to that extent against their liability for the $42,273.3 for which they are otherwise admittedly liable on account of their expenditures in breach of trust.

Respondents, as in the case of the Kimmel Farm, argue (p. 43) that the Worrel House was not actually purchased from Kleberg Town and Improvement Company. No rec-

ord reference to support this erroneous statement is contained in respondents' Brief, and it is flatly contradicted by the Master's findings (R. 417) that "On June 30, 1934 the Executors and Trustees of the King Estate purchased from Kingsville Town and Improvement Co. a house and lot in the City of Kingsville."

Respondents vigorously argue (p. 44) that the Worrel House was needed for a bookkeeper; but that excuse does not condone the breach of trust from which Mrs. Kleberg benefitted, under Texas law.

Respondents argue (p. 44) that the transactions with the Kleberg Town and Improvement Company were not in breach of Article 7425-b(12) of the Revised Statutes of Texas, because the statute was not enacted until 1943, whereas the trust terminated and the property was partitioned in March, 1935. But as we have shown in petitioners' Brief (p. 36), Article 7425-b (12) of the Revised Statutes of Texas was merely a codification of the prior Texas law of trusts, whereby any purchase of real property from, or any other expenditures of trust funds for the benefit of, a corporation owned or controlled by trustees, constitutes a breach of trust.

The writs of certiorari should issue to correct these errors of the Circuit Court of Appeals and the District Court in this case.

X.

The trustees failed to collect from Mrs. King's partners in the Kleberg Bank, a co-partnership, their 90% share of the losses aggregating $499,101.13 under their right of contribution from the other partners.

Respondents plainly admit (p. 46-7) that the trustees failed to collect, under their right of contribution, the 90% portion of the losses to the Trust Estate caused by the trustees' payment of $499,101.13 to the Kleberg Bank partnership for which the other partners were liable to the Trust Estate. Respondents claim, however, that *the actual loss* to the Trust Estate was only $299,824.09, rather than $499,101.13.

The only defense which respondents attempt is the argument (p. 47) that petitioners as beneficiaries have not "lost anything by delay," the argument being that petitioners as beneficiaries may still have some future opportunity to recover their share of 90% of the $299,824.04 which respondents admit constitutes a loss to the Trust Estate.

But an examination of the Final Decrees in Appeals Nos. 11704 and 11717 (11704, R. 440-2; 11717, R. 444-9) will conclusively show that the trustees have partitioned the Trust Estate without collecting any part of the 90% of the losses aggregating $299,824.04, on the one hand, and without partitioning the claims to such contribution, as a distributable asset of the Trust Estate, on the other hand.

It is plain that if the writs of certiorari be not granted, the trustees will claim the defense of the two Final Decrees in Appeals Nos. 11704 and 11717 as a complete release of their liability to petitioners for their failure to collect 90%

of the loss of $299,824.04 under their right of contribution, and also for their failure to partition such right of contribution as a distributable asset of the Trust Estate.

Respondents make an extensive argument (pp. 48-9) that the trustees had the power to carry on the business of the Kleberg Bank co-partnership under Mrs. King's Will, a matter which is not disputed in our Petition and which is utterly irrelevant to their failure to collect 90% of $299,824.04.

The writs of certiorari should accordingly be issued to correct the error of the Circuit Court of Appeals in confirming, in Appeals Nos. 11704 and 11717, the Final Decrees which were entered in Equity 74 Ancillary and Equity 102 in the District Court.

The Burden of Proof.

At the foot of their Brief, respondents devote ten pages (pp. 50-61) to an extensive argument that the Circuit Court of Appeals was correct in stating in its opinion that the burden of proof in this case was upon the beneficiaries (petitioners), and not upon the trustees (respondents), because the Circuit Court's majority opinion doesn't really mean what it appears to say, but means something quite different if construed in the light of the alleged "contentions" which petitioners were supposed to be making in that Court. Petitioners have never made *any* of the many "contentions" which are referred to in respondents' Brief.

The very elaborateness of this argument shows how erroneous the Circuit Court's majority opinion is on the subject of the burden of proof, for otherwise respondents would not have attempted by such means to bolster it up.

Respondents conclude (p. 56-7) that what the Circuit Court really meant in its majority opinion was that the burden of proof is upon petitioners *upon the theory that they have charged "fraud" against the trustees.* But, as petitioners showed in their Reply Brief filed in the Circuit Court of Appeals (pp. 2-3), *there is no foundation whatsoever* for the contention that petitioners have attempted to charge or prove "fraud" against the trustees. If this Court will examine plaintiffs' Complaint in the main suit (11718, R. 8-33), it will be conclusively seen that petitioners have merely charged the trustees "with the following *breaches of trust* in the administration, management and control of said trust estate." Similarly, the Second Amended Ancillary Complaint (11704, R. 36-304) and the First Amended Complaint in Equity No. 102 (11717, R. 12-184) likewise reveal that no "fraud", but only "breaches of trust", are charged against the trustees.

Respondents also maintain (pp. 57-8) that the trustees ought to be relieved of liability for their breaches of trust if they acted "in good faith," citing *Couts* v. *Holland*, 107 S. W. 913, and two other Texas cases. An examination of these cases, however, will immediately demonstrate that they utterly fail to support any such erroneous proposition. On the contrary, such Texas cases as *Slay* v. *Burnett Trust*, 180 S. W. (2d) 480, 187 S. W. (2d) 387, cited in our Petition (p. 30), conclusively hold that "good faith" will *not* relieve Texas trustees of their liability for breaches of trust by benefitting themselves (or their families) from their Trust Estate.

Finally, respondents say (pp. 59-61) that the trustees under Mrs. King's Will were exempted from liability by "the language about doing whatever she would have done" *if living*, which is contained in the Will (R. 42). The briefest examination of the cases cited (pp. 59-60) (all from

other jurisdictions than Texas) will show conclusively that they dealt with wills *which contained actual exculpatory provisions,* such provisions bearing not *the slightest resemblance* to the language referred to from Mrs. King's Will.

Actually, Mrs. King's Will contained no exculpatory or other clause remotely like that involved in any of the cases respondents have cited.

We suggest to this Court that the real reason for the long argument about "burden of proof" at the close of respondents' Brief is to draw attention away from the many serious errors of the Circuit Court of Appeals and the District Court to which our Petition is primarily directed.

Conclusion.

Petitioners earnestly submit that the admissions in respondents' Brief plainly show that the Circuit Court of Appeals, in affirming the District Court in this case, failed to apply the Texas statutes and the Texas law of trusts to the many gross breaches of trust by the trustees of Mrs. King's Trust Estate; and it is obviously conceded by respondents that such failure is a plain violation of the Federal Rules of Decisions Act embodied in Section 725 of the Judicial Code and the many emphatic and recent decisions of this Court requiring the Federal Courts to apply the state statutes and state law in diversity cases, as contemplated by Rule 38(5)(b) of this Court.

In view of the plain and admitted refusal of the Circuit Court of Appeals to apply the laws and statutes of Texas in this case, in violation of its duty in that regard, it is earnestly submitted that the writs of certiorari should issue by order of this Court.

Respectfully submitted,

BRADY COLE,
Counsel for Petitioners.

THOMAS H. FISHER,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Nos. 443, 444, and 445.

EDWIN K. ATWOOD and ALICE B. ATWOOD,
Petitioners,

vs.

ROBERT J. KLEBERG, JR., CAESAR KLEBERG, RICHARD M. KLEBERG, JOHN D. FINNEGAN, SAMUEL G. RAGLAND, and RICHARD KING, Individually and as Trustees under the Last Will and Testament of Henrietta M. King, Deceased, et al.,

Respondents.

REPLY AND BRIEF IN RESPONSE TO THE PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

LEROY G. DENMAN,
Counsel for Respondents.

ROBERT W. STAYTON,
MARCELLUS G. ECKHARDT,
ROBERT F. CAMPBELL,
Of Counsel.

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Respondents.

REPLY AND BRIEF IN RESPONSE TO THE PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Supreme Court of the United States:

I
PRELIMINARY STATEMENT OF MATTER INVOLVED

As will be shown more fully hereafter, the Respondents do not agree to Petitioners' statement of the facts, to their statement of what the courts below held, or to the statements that the opinion below was based merely on the question of burden of proof, etc., or that

it failed or refused to apply the laws of Texas. The questions involved in the three cases were principally questions of fact. A Master was appointed, and very lengthy hearings were had, some eighteen thousand pages of testimony were taken, and vast numbers of documents and auditors' reports and books of account were filed; and a report was filed by the Master. Further extensive hearings were held by the trial court, additional testimony was received, and the Master's Findings were approved and adopted by the trial court; and many additional findings were made by the trial court. Those findings on each of the claims asserted by Petitioners herein were contrary to the facts asserted by the Petitioners. For convenience we are filing as Appendix to this Brief printed copies of the Findings of the Master and the Findings and Conclusions of the Trial Court with page numbers inserted in the margins to correspond with the record in the Circuit Court of Appeals. It will be seen from those that very few of the legal questions raised by Petitioners actually arose, because the facts found were contrary to the facts alleged by Petitioners. At the time of the preparation of this reply, we are advised, and the service of the record upon us confirms the fact, that the vast quantity of testimony and documentary evidence received before the Master and the Trial Court and filed as part of the record in the Circuit Court of Appeals, has not been filed by Petitioners in the Supreme Court.

II
COUNTER PROPOSITIONS

The Trustees properly administered the Estate and correctly partitioned it in accordance with the Will,

all in good faith, and duly accounted, and the Findings of the Master and the Trial Court to that effect, and the judgment of the Circuit Court of Appeals confirming the judgment below, are all sustained by the evidence.

The Master and the Trial Court, after reviewing the voluminous oral and written testimony taken over the long period of years, found against the Petitioners on each of their complaints of wrongdoing against Respondents, and reiterated again and again throughout the findings shown in the Appendix, attached, that the,

> "Executors and Trustees administered the trust diligently and in good faith".

For example, Appendix pages 12-13, states that all of them,

> "* * were skilled in the performance of their duties. Their services were valuable and conscientiously rendered, and the compensation received by them of every kind was not in excess of the value of their services".

The Court, in adopting the Master's Findings and in holding that the accounting was sufficient to discharge all burdens upon the Trustees, describes, in the Appendix pages 134-136, the method of accounting and concludes that the method of accounting was sufficient and that the Trustees have discharged their full duties under the law.

We will now discuss briefly the individual items complained of by Petitioners in their specifications of errors, page 24 of their Petition herein.

a. Executors' Fees. The Petitioners contend that the Executors never acted, never received or disbursed any money, and were not entitled to any compensation. The Master found as follows:

> "On April 7, 1925, Richard King, Jr., Robert J. Kleberg, and Caesar Kleberg filed the Will for probate in the County Court of Kleberg County, Texas and sought appointment as independent executors without bond, they being nominated as such in the Will together with James B. Wells, who had previously died (Defendants' Ex. 5). On May 6, 1925, the Will was admitted to probate, and on the same date the Independent Executors qualified as such by taking the oath (Defendants' Ex. 6, 7, 8 and 9). On April 24, 1926, defendants filed their inventory, appraisement, and list of claims (Defendants' Ex. 10). And on June 30, 1930 the court entered an order approving the inventory and appraisement, closing said estate and dropping same from the docket (Defendants' Ex. 20)." Appendix of Master's and Court's Findings and Conclusions, page 1.

The Master again finds:

> "Executors' Fees. The Executors of the Estate never at any time during the trust relinquished or abandoned their authority as Executors, and continued to act in said capacity throughout the trust. For their services as Executors they were paid the sum of $300,000, divided equally between Richard King, Jr., Caesar Kleberg, and the Estate of Robert J. Kleberg. The amount of the Executors' fees was fixed by agreement and was much less than the amount to which the Executors would have been entitled to receive had same been calculated upon receipts and disbursements provided by law, since the cash receipts during the period amounted to $18,457,356.92 (Defendants' Ex. 182)

and cash disbursements amounted to approximately the same sum." At said Appendix, page 16.

The Trial Court in addition to adopting the Findings of the Master, finds and concludes as follows:

> "The Will also appoints Robert J. Kleberg, Sr., James B. Wells, Caesar Kleberg and Richard King, Jr. as Executors of her Will and Estate. No limitation was placed upon the compensation of the Executors, and the Executors were therefore entitled to the fees fixed by Texas law, i.e., five percent on all receipts and five percent on all disbursements, excluding cash on hand at the time of the death of the testator and excluding disbursements to beneficiaries in the final settlement. The fees actually paid the Executors as found by the Special Master are well within, in fact, very much less, than provided by the statute." Appendix pages 137-138.

A great volume of evidence, both oral and written, was offered in answer to Petitioners' claim below that the Executors had never acted. Great quantities of documents were offered showing that they acted in the settlement of the estate, in bringing suits, defending suits, making the estate tax returns and litigating it over a period of several years, executing practically all promissory notes, deeds of trust, conveyances, bills of sale and other documents in behalf of the Estate during the entire ten year period, in a large number of instances appearing alone for the Estate, and in others appearing jointly with the Trustees. The settlement of the debts of Mrs. King and estate and inheritance tax amounting to several million dollars proceeded through the ten years. Therefore these questions of fact on which the Petitioners base their con-

tentions here were decided against them below, such decisions being based upon overwhelming evidence.

Two additional assertions are made by Petitioners which they also made below, and in that respect were followed by Justice Waller in his opinion dissenting from the majority on this point. Petitioners say that the $300,000 Executors' fee was fixed as an afterthought, the original estate tax return having claimed only $110,394.39. The facts shown by the record are that the original estate tax return showed that as being the amount *that had already accrued at the date of the filing of the return,* which was only a few months after the decedent's death. However, by the time the return was finally audited and the tax determined, additional receipts and disbursements had occurred, and the sum of $300,000 was shown to have accrued and was allowed by the Federal tax authorities as a proper deduction in the final determination of the estate tax. That determination was made many years before the expiration of the trust and expiration of the administration, the Federal estate tax proceedings being in evidence in the Circuit Court of Appeals, Defendants' Ex. 108 to 120. The Petitioners had made the erroneous statement above about the amount shown by the estate tax proceedings, and Judge Waller assumed the correctness of Petitioners' statement.

The other of the two additional theories advanced by Petitioners on this point, which Judge Waller followed in his dissent on this point, was as follows: The Will provided that no action should be had in the county court or any other court having jurisdiction in matters of probate in relation to the estate or the settlement thereof, except the probate and recording of the Will and the return and filing of the inventory,

appraisement and list of claims, and that the Executors should not be required to give bond. Petitioners contended, and Judge Waller in his dissent said, that as a result the duties of the Executors were merely nominal. The majority of the Court did not agree. They were well versed in Texas laws of practice in that regard which are as follows: Texas has a probate system modeled largely on the Civil law as inherited by it from Spain and Mexico, and accordingly, from the beginning of the Republic and State, provided for two methods of administering an estate. One is by an administrator or executor directed by the probate court. The other is what is popularly known as an independent executorship. The statute provides how the independent executor shall be created in Article 3436, Revised Statutes of Texas, which reads as follows:

> "Any person capable of making a will may provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement and list of claims of his estate."

The effect of following the terms of that statute, as Mrs. King did in her will, is simply to authorize the executor to do anything without an order of the probate court which an ordinary executor can do with an order. *McDonough v. Cross,* 40 Tex. 251, 280; *Roy v. Whitaker,* 92 Texas, 346, 356-7; 48 S. W. 892, 896.

It does not decrease the responsibilities or duties of the executor. On the contrary, it increases them to the extent that such an executor is entrusted with greater powers and performs the functions performable by an

ordinary executor, plus the functions which the probate court would ordinarily perform in the case of an ordinary executor. It further increases his responsibilities because such an independent executor does not have the protection of the probate court for the orderly administration of the estate in the case of meeting its debts, for he can be sued and the estate in his hands levied upon, just as in the instance of living persons when responding for their own debts. Regardless of the exemption from bond, any creditor or heir can require bond of him upon showing the probate court of hazard. Revised Statutes of Texas, Articles 3438 and 3443. The probate court does not lose jurisdiction. "The administration is still pending." *Roy v. Whitaker,* 92 Tex. 346, 355; 48 S. W. 892, 896. He may, also, if he chooses, or if he is required to do so by the probate court, account in the probate court. The vast majority of all testators exercise this election to have their estates administered by independent executors. One of the characteristics of such independent executorships as this is that they may proceed simultaneously with trusteeships, *Cleveland v. Cleveland,* 89 Texas 445; 35 S. W. 145; *Houston Land & Trust Company v. Campbell,* 105 S. W. (2) 430.

The Courts below were supported by the evidence in holding that the compensation of the fiduciaries was not only within the law, but was reasonable. The Master, Appendix page 12-13, found that the amount due to the Trustees for the Trustees' commissions was $288,815.47, although they had received only $111,752.76; and the Court found that,

> "Likewise the compensation paid the Trustees is well within, in fact less than half, that permitted by the Will." Appendix page 138.

The Trustees' fees amounted to an average, per person, of $133.08 per month, and the Executors' fees to an additional of $357.10 per month, per person, for the various Trustees and Executors combined.

The Findings, as above stated, were that there were approximately $18,000,000 of cash receipts and approximately $18,000,000 of cash disbursements upon each of which the Executors' commissions would amount to five percent. In addition to that, there were many constructive receipts. Petitioners construe the words "actual cash receipts" in the statute as meaning something that could not include cash constructively paid or received. Petitioners' construction is not in accordance with that of the Supreme Court of Texas. For example, the Supreme Court in *Huddleston v. Kempers,* 87 Texas 372; 28 S. W. 936, held that the words "actually received" would even include amounts bid at a foreclosure sale of the estate to pay a debt of the estate, although the bid was merely credited on the note by the bidder and no money was actually handed over to the executor. Likewise, the Supreme Court of Texas held in *Von Koenneritz v. Ziller,* 112 Texas 126; 245 S. W. 423, that the commission applied even to money borrowed by the Executor from himself to pay debts of the decedent, both on the receipt and disbursement thereof. These rules of probate law of Texas, of course, were within the familiar knowledge of the Judges of the Courts below, like the Trial Judge, Honorable T. M. Kennerly, and Judges of the Circuit Court of Appeals, like Honorable J. C. Hutcheson, who had practiced law and sat as judges in Texas jurisdictions for most of their lives.

b. Improvements on Lands. Again, we find that the Findings of Fact, which were fully supported by the

evidence, are not in accordance with the facts which Petitioners state and on which they base their assignment of error. The Will, after giving other broad powers enumerated in the opinion of the Circuit Court of Appeals, which would have included the power to make improvements, also expressly provides that there,

> "* * * is embraced power in their judgment and discretion to keep up and to make all necessary improvements."

There was a great quantity of evidence offered to show that the improvements consisted almost wholly of fencing necessary to enclose and maintain the enclosures of the various pastures needed in carrying on the livestock business, and the building and maintenance of gates, chutes, dipping vats, and watering places, also necessary therefor; that said improvements were fairly and reasonably distributed over the respective lands, and amounted to only a small sum per acre per year or a small sum per mile of the fences on the property per year, or a small sum per head of cattle (Defendants' Ex. 550 in the Circuit Court of Appeals), and large quantities of additional oral evidence supplementing it showed the total fence mileage to maintain on the specifically devised lands was 1082 miles; that the total fence mileage of the residuary and leased property was 331.71 miles, a total of 1,413.71 miles to maintain; that the expenditure per year per mile on the specifically devised lands was only $18.48, or only two and a fraction cents per acre per annum; that the cost on the leased lands was only $15.33 per mile per annum, or only one and six-tenths cents per acre per year; that the cost per head of cattle being operated was less than $1.25 per head per year.

The oral testimony showed the condition of each item at the time of the death of Mrs. King and at the time of the end of the trust and the partition and the nature of the respective things done. The Master found:

> "I find the improvements made to these properties were made in good faith by the Executors and Trustees; that same were necessary to the economical operation of said properties and that the cost thereof was reasonable." Appendix page 35.

The Master also found specifically in reference to the Robert J. Kleberg, Jr. lands leased to Mrs. King:

> "I find that the new improvements placed on the above ranches were necessary to the economical operation of said properties and that the cost thereof was reasonable; that the repairs made to said properties were in accordance with the terms of the contract under which the same was leased by the Estate, and were necessary to the proper operation of the properties, and that the cost thereof was reasonable. I further find that in spite of the sums expended for repairs and improvements, said improvements were worth less at the end of the trust than they were upon the dates of the respective leases." Appendix pp. 33-34.

Again, in reference to repairs to improvements:

> "I find that such repairs were made in good faith by the Executors and Trustees and were necessary for the economical operation of the properties; that such repairs as were made to the improvements on the 30,439.23 acre tract (the tract owned by Alice G. K. Kleberg leased to Mrs. King) were less than those reasonably called for under the terms of the lease and that the improvements on the 30,439.23 acre tract were less valuable at the

> end of the trust period than they were at the beginning thereof, in spite of the repairs and improvements to same." Appendix p. 35.

The Court approved the Master's Findings of Fact above set out and then (Appendix page 139) found that the Trustees' action in reference thereto was lawful; and again, Appendix page 168, quoted from and adopted the Master's Findings of Fact thereon and added:

> "The evidence does not support plaintiffs' claim that they were unjustly or unfairly treated with respect to the making by the Trustees of improvements on the property of the Estate, nor in the partition."

c. Living Expenses of Mrs. Kleberg and the Trustees. Again, the Findings of the Master and the Trial Court, fully supported by the evidence, are contrary to the facts on which Petitioners base their propositions of law. Instead of paying all the living expenses of the Trustees and their families as contended by Petitioners, the evidence and the Findings of the Master and Trial Court show the following. The facts differed as to each of the Trustees. Some of them, principally those engaged in the actual handling of the cattle, where they were necessarily on the million acre ranch supervising the cattle work and many hundreds of Mexican employees, received lodging and meals for themselves and their immediate families at any of the various headquarters, camps, and other facilities maintained on the ranch, as did practically all of the employees of the ranch, and received that as part of their compensation. The detail of what was received by each is set out by the Master in his Find-

ings, Appendix pages 4-13, and is concluded with the Finding of the Master that,

> "Their services were valuable and conscientiously rendered, and the compensation received by them of every kind was not in excess of the value of their services."

Again, as to Mrs. Kleberg, Sr. specifically, the Master, after finding that she lived at the Headquarters building and supervised it, says:

> "The Headquarters house was also the place where large numbers of employees and persons having business with the ranch were lodged and provided for. During the trust period Mrs. Alice G. K. Kleberg supervised the maintenance of the Headquarters house and the house kitchen at which many of the employees of the ranch were fed, entertained the guests and business associates of the ranch, and therefore rendered valuable service to the estate." Appendix page 42.

And again, Appendix page 42:

> "It appears from the record that it is not possible to segregate the cost of the food and lodging furnished Mrs. Kleberg and the members of her family who resided with her after her husband's death from the cost of providing the same facilities to the employees of the ranch. However, such cost was only a *small fraction of the total expense* carried in an account known as the House Kitchen account as a part of the Santa Gertrudis operations." (Emphasis ours.)

Petitioners' theory in saying that vast sums were expended on such living expenses is that the finding that it is impossible to segregate these items from total expense makes the Trustees chargeable with all

expense, and in that way Petitioners arrive at various large sums stated in different amounts in each of their various briefs and pleadings. It would be as logical to charge an officer of the United States Army in Europe or the Pacific with the entire cost of the War because the value of his housing and food could not be segregated accurately from the remainder of the cost of the War; or to charge a Pullman conductor with the cost of operating a train of cars because no exact calculation could be made of the cost of his food and lodging on the train while pursuing his duties. Here, those of the Trustees, as itemized in the Master's Report, who attended to the actual detailed daily operations of the cattle business on the ranch, necessarily living thereon, could not practically determine the exact amount. For example, Robert J. Kleberg, Jr. and Caesar Kleberg were generally, except while traveling elsewhere on the Estate's business, actually out in the pastures on horseback from before daylight until after dark, and spending hours after dark with executive duties; and the major portion of their meals and many of their nights, like those of many employees of the ranch, were in camp, eating with the cow outfit from the chuck wagon, frequently sleeping in bunkhouses or on the ground wherever their duties carried them. At the large main Headquarters, as the witnesses summoned by plaintiffs testified, there were no festivities; but it was a veritable hotel for employees coming and going from all over the ranch on the ranch's business, persons coming to the ranch to buy cattle from the ranch or to sell cattle to the ranch, or engaged in negotiations with these managers over the many business enterprises of the Estate, all such persons' wants being cared for by Alice G. K. Kleberg with the assist-

ance of only Mexican men servants, who also simultaneously worked as cowhands, windmill repair men, etc. There is no legal prohibition against paying employees partly in cash and partly in housing and meals for themselves and families. It is common in most businesses where attendance at the place of business is regularly required, such as doctors, interns, and other personnel in hospitals, managers and other help in hotels, and managers and caretakers of public parks and preserves. It has been approved even in the payment of public employees, *State ex rel. Johnson vs. Brown,* 111 Minn. 80; 126 N. W. 408. There, the court held that the power vested in the city commissioners to maintain public parks authorized them to build a residence thereon and provide the use and maintenance of it for the superintendent or his family as a part of his compensation. It was shown to be customary in the ranch business on account of distance from other facilities. Samuel G. Ragland, one of the Trustees, lived principally in his own home in Kingsville; John D. Finnegan, one of the Trustees, lived in Kingsville in his own home; Richard King lived in Corpus Christi in his own home; and each of the said persons living away from the ranch received only very nominal accommodation from the ranch, incident to their duties and compensation, as detailed in the Master's Findings, Appendix pages 3-14. Richard M. Kleberg lived in Corpus Christi in his own home. Although he received a house allowance from Mrs. King during her lifetime as part of his salary, and the same amount from the Estate, nevertheless, in the partition it was charged against his mother's share of the estate with six percent annual interest. Plaintiffs throughout the record complain that those who lived in their own

homes in Corpus Christi were entitled to no compensation because they did not live on the ranch, and surely as a result could not have been attending fully to the business; and at the same time contended that those who did live on the ranch through necessity from devoting their whole time on almost around the clock basis, should have no use of the ranch facilities and should be charged with most of the expenses of running the entire ranch. In this complaint, like the others, the facts have been found by both the Master and the Trial Court the contrary of their assertions here, so that the questions of law they raise do not actually exist in the case.

d. Rents Paid to Robert J. Kleberg, Jr. The Petitioners in connection with that specification of error follow on page 35 with a play on the wording of the Master's and the Court's Findings, stating that the Trustees claimed that it was paid under a written lease between Mrs. King and Mr. Kleberg, made before her death, and say:

> "But the Master three times found, and the Trial Judge confirmed, that it was the Trustees and not Mrs. King who had leased the Encino Ranch from Robert J. Kleberg, Jr.".

That is not borne out by any reasonable interpretation of the Findings. The allegation had been made in the petition below that the Trustees had leased the property from one of their number. The defendants replied that the lease had been made to Mrs. King before her death and both oral and written evidence was introduced thereon, among others, the detailed account of the purchase of the property by Robert J. Kleberg, Jr. as trustee for himself and his brother and sisters

and cousin and the simultaneous leasing of the land by him to Mrs. King during her life and the stocking of the ranch by Mrs. King with her cattle. The Master, in his Findings on page 14 of the Appendix, recites those facts and then follows with the following language:

> "On July 1, 1924 this ranch was leased to Mrs. H. M. King by written agreement (Pltff. Ex. 12; Def. Ex. 168) for a period of ten years ending June 30, 1934, at a rental of 35 cents per acre, per year, payable semi-annually. The lease also provided that Mrs. King should keep the property in as good condition as it was in at the beginning of the lease, natural and reasonable wear and deterioration excepted."

It will be noted that the Findings expressly state that the lease was to Mrs. H. M. King and gave a date occurring during her life, and expressly state that it obligated the lessee, Mrs. King, to keep the property in such condition. The Findings then, on the same page, describe the improvements and the fact that within sixty days thereafter Mrs. King, not the Trustees, placed thirty-five hundred head of her cows and bulls upon the ranch and then follows:

> "* * and she during her lifetime, and her Executors and Trustees after her death, continually used said property for ranch purposes until the expiration of the trust."

It consisted of approximately 141,000 acres of land. Petitioners make the charge here that because the Master in subsequent Findings incidentally dealing with the lease used language referring to what improvements were made and how the operations were

conducted upon the various properties referred to as leased properties, whether leased by Mrs. King before her death or by the Trustees after her death, as being lands under lease to the Trustees, or leased by the Trustees. It is clear that such incidental references did not mean to negative the express Findings made dealing directly with the subject of who made such leases. Voluminous evidence was taken by the Master and presented to the Trial Court on the reasonableness of the rental, both on this tract and the tract which Mrs. King had likewise leased during her life but which continued in effect during the trust, from Mrs. Kleberg, on which the general Headquarters of the entire ranch are situated, including approximately one hundred ninety buildings and 30,439.23 acres of land; and the Master's finding as to the lands leased from Robert J. Kleberg, Jr. by Mrs. King was:

> "I find that the use of the Encino and Stillman Ranches was necessary and advantageous to the Estate and that the rentals paid thereon were reasonable." Appendix page 15;

and as to the land leased by Mrs. King from Mrs. Kleberg, that the rental was $10,000 per year plus ad valorem taxes, only part of which were paid; and in reference to the reasonableness of the rental, the following:

> "I find that the use of the headquarters property was advantageous to the estate; that had same not been used, other facilities similar in nature would have had to be provided; that the reasonable rental value of the property was not less than $75,000.00 per year; that the amount of rentals paid by the estate for the use of the property, including taxes, repairs, new improvements and food

> and lodging furnished Mrs. Alice G. K. Kleberg and such of her family as lived with her from time to time, was far less than the reasonable rental value thereof." Appendix page 42.

The Trial Court, after adopting the Findings of Fact by the Master, follows with his conclusions that the renting and purchasing of lands was within the terms of the Will and not illegal, Appendix page 138, and after quoting the Master's Findings with approval, again approves the leases and payments.

It will thus be seen that the questions of law Petitioners attempt to present are not in the case, because after a full hearing of the evidence, the fundamental facts upon which the Petitioners base their law questions have been found against them: First, that the leases were made by Mrs. King and not by the Trustees; and second, that the rentals were less than reasonable for the property, and they were necessary and advantageous to the Estate.

e. Alleged Purchase of Land from Kingsville Land and Investment Company. Petitioners contend in their further explanation of this "Specification of Error" on page 36 of their Petition that the Trustees had purchased real property from the Kingsville Land and Investment Company, a corporation whose entire capital stock was owned by two of the Trustees. They describe the item as being the Kimmel Farm, Petition page 12, and cite a Texas statute, Article 7425 (b) 12, which was not enacted until 1945, ten years after the expiration of this trust, and twenty years after the death of Mrs. King. In the Trial Court they contended that this tract of 185.39 acres of land known as the Kimmel Farm, adjoining the main shipping pens

of the ranch, had been purchased from Robert J. Kleberg, Jr., personally. It was shown that the details of the purchase were handled through the Estate's attorney, but that the seller in sending in the deed made it to Robert J. Kleberg, Jr., one of the Trustees, instead of all the Trustees; whereupon, Robert J. Kleberg, Jr. simultaneously conveyed it over to all of the Trustees; that the purchase was negotiated in behalf of the Estate and the whole paid for by the Estate, and that Robert J. Kleberg, Jr. received no consideration personally in the matter and was merely acting in his representative capacity as one of the Trustees of Mrs. King's Estate. The Master found, Appendix pages 15-16:

> "On July 14, 1933, the estate purchased 185.39 acres of land in Kleberg County, Texas, known as the Kimmel Farm, for $13,904.27 of which $8,571.89 was paid in cash, and the balance was represented by the assumption of a note in the amount of $5,332.38 held by Dallas Joint State Land Bank. The property lay adjoining the Caesar pens, the principal shipping point in the upper ranch, was improved with a house, barns, and fences and planted in Rhodes grass. It was purchased because it was a desirable place to pasture young bulls. Title to this property was taken first in the name of Robert J. Kleberg, Jr., for convenience and, by him, conveyed to the estate."

The Trial Court adopted the Master's Findings of Fact, and also made the conclusion that purchasing of lands by the Trustees as found by the Special Master was within the terms of the Will and not illegal, Appendix page 138. In the Circuit Court of Appeals the Petitioners claimed that a small part of the purchase price went to the Kingsville Land and Invest-

ment Company in payment of a small lien on the tract held by it, the principal lien being held by the Dallas Joint Stock Land Bank, and that the stock of the Kingsville Land and Investment Company belonged partly to the Estate of Robert J. Kleberg, Sr., who was then deceased, whose sole heir was Mrs. Alice G. K. Kleberg, partly to Caesar Kleberg, and partly to the Estate of one Charles H. Flato, then deceased. The Circuit Court of Appeals overruled their contentions in reference to this and other purchases. There was no purchase made from the Kingsville Land and Investment Company as here alleged. It is here, in the Supreme Court, for the first time that they allege that any land was ever purchased from the Kingsville Land and Investment Company by the Trustees. The Will, among the powers given, authorized the Trustees in paragraph EIGHTH, Section 3, page 54 of the printed part of the record in No. 11718 in the Circuit Court of Appeals, in addition to the powers expressed in more general language, to

> "* * purchase any and all such property, real and personal, as they or him in their or his judgment and discretion may deem necessary or advantageous for the purposes of this trust."

It is obvious that the fact that the owner of this property paid a small part of the consideration to the Kingsville Land and Investment Company to discharge its lien on the property would not constitute a breach of trust on the part of the Trustees merely because that small lien was held by a corporation in which Mr. Kleberg's Estate, et al., held some stock, in the absence of any showing of fraud or other impropriety.

f. The Alleged "Gifts and Donations". Again, the legal proposition advanced by Petitioners is founded on an alleged state of facts which have been shown by the evidence and found to be incorrect by the Courts below. The various so-called gifts and donations which they complain of are itemized in more detail in the Petition, pages 13-14, and will be discussed separately, since the facts differ as to each.

(1) *The payments to the Presbyterian Church:* Mrs. King in her Will had devised some city lots to the Presbyterian Church of Brownsville, Texas, of which her father had for many years during his lifetime been the minister, and also devised the sum of $5,000 for the purpose of erecting a residence for the minister of such Church. Mrs. King's representatives in handling her property, who were the same persons as were later Trustees under her will, by inadvertence shortly before her death sold these lots for the sum of $6,500. The Church claimed from the Executors of her Estate the proceeds and also claimed the $5,000 cash devised. The Executors allowed the claim and made the payment. We submit that under the provision discussed in the opinion of the Circuit Court of Appeals giving the fiduciaries the power to make a good faith determination of their duties and powers, their decision was final, there being no question of good faith in the transaction. Furthermore, we submit that this was a matter peculiarly within the jurisdiction of the Executors and the jurisdiction of the probate court in which the will was probated, and not within the jurisdiction of the Federal court, since it has no probate jurisdiction. This was one of the devises and bequests outside of the trust, as were a number of others in the Will prior to the portion of the Will placing in trust

the remainder of the estate after the satisfaction of such specific devises and bequests. Furthermore, it is submitted that it was within the power of the representatives of Mrs. King's Estate under the broad powers given in her Will to make such reasonable provisions for such institutions in the territory in which her ranch and business were situated, as will be more fully discussed hereafter in this paragraph f.

(2) Complaint is made of subscriptions to the National Democratic Committee of various sums aggregating $6,729.30, mainly having to do with opposing matters which the Trustees deemed inimical to the agricultural interests of the business in which the Estate was engaged, particularly the policies promulgated under Mr. Hoover's food administration which, it was shown, they, along with the greater number of agricultural interests of the Nation, believed resulted in the terrible collapse of the agricultural and livestock values in which a majority of the agricultural operators in the country failed. After hearing voluminous evidence on each of the various items complained of by the Petitioners below, including these and other items, the Master made Findings as to each, itemizing them, and then found:

> "I find the moneys expended by the Estate and charged to subscriptions and donations were spent in the interest of the Estate and that none of said payments were made for the advantage of the Executors and Trustees as individuals." Appendix page 52.

The Trial Court approved and adopted the Master's Findings and also made his conclusion, Appendix page 140, that the Presbyterian Church and the other vari-

ous "donations" set forth in the Master's Report were proper and the plaintiffs had no ground for complaint. Again, the Trial Court, on pages 145-146 of the Appendix, discussed briefly the history of Mrs. King's property; the large territory it covered; how, upon her and her estate that part of the country and her employees necessarily depended for development along industrial, educational and religious lines; and that by her Will she authorized her Estate to carry on those things in the same manner that she had done for the ten year period of the trust, expressly providing that they should carry on her affairs in the same way that she would have done herself if living. And again, Appendix page 182, the Court quotes the Master's Finding to the effect that these expenditures were made in the interests of the Estate and not for the advantage of the Executors and Trustees as individuals, and calls attention to the meagre size of them and finds that the "total of contributions and subscriptions were surprisingly small, * * taking into consideration the size and nature of the estate and the length of time that the Trustees administered the estate"; and that they were proper, considering the interests of the estate, the wide discretion given to the Trustees, and the expression in her Will of her direction to have the administration carried on in the same manner that she would have carried it on if she had lived, and in view of the fact that these items were in accordance with the manner she had carried on the estate.

(3) *$2,500 Paid to Robert J. Kleberg, Jr.* The evidence had shown in great detail that Robert J. Kleberg, Jr. had been for a few years before Mrs. King's death the active general manager of her ranch (acting

under the general direction of Robert J. Kleberg, Sr. and in cooperation with the other persons who were afterwards her Trustees). He continued under Robert J. Kleberg, Sr. to have the primary responsibility of the management of the business, acting in cooperation with the Executors and other Trustees thereafter. The evidence showed that he was a man of exceptional ability and industry and that his services were of great value to the Estate. He worked for a comparatively nominal salary. At the beginning of the trust he was unmarried. In 1926 he was engaged to be married and informed the Executors and other Trustees that, in view of the fact that he was assuming the responsibility of marriage, he felt that he should be paid a salary more fitting to the value of his services. The testimony showed that a reasonable value would have been a minimum of $50,000 per year, as against the $400 per month he was being paid. The others indicated they would consider the matter, and paid him $2,500 immediately, but nothing more was done about the raise in salary. The Master finds, Appendix page 50:

> "$2,500 was paid to Robert J. Kleberg, Jr. and incorrectly charged to the donations account. This payment was made at the time of the wedding of Robert J. Kleberg, Jr. in response to his demand for additional compensation for his services."

So again, on this item, the legal propositions Petitioners present on the theory that this was simply a wedding present fall to the ground because the Findings below, based on the evidence, do not support the facts as alleged by Petitioners.

Attention is also called to the fact that in their pleadings (Record in No. 11718 in the Circuit Court

of Appeals, pages 204, 209, 326), the Respondents set up the large sums still owing them for Trustees' fees and Executors' fees, and ask, only by way of offset, that any amount that should be found to be chargeable to them, either by way of these so-called donations or other items, should be offset against said additional sums owing to the Trustees; and both the Master and the Trial Court found that the sums actually paid to them were greatly less than the amount due them as above described. The plaintiffs contended that if the Court charged any item against the Trustees they would forfeit all right to any compensation and would be liable for the repayment of all compensation that had been paid. It has been decided expressly that that is not the rule in Texas. In *Smith v. Belding,* 237 S. W. 246, the Commission of Appeals, (opinion approved by the Supreme Court of Texas) held that the trustee may have the offset even though he has not pleaded it, and even though he was guilty of willful default. The court recognized that the decisions of some other States were different, but refused to follow them, saying that no such bonus should be granted to the beneficiaries.

g. Alleged Liability of the Trustees for Failing to Collect "Indebtedness" Due the Trust Estate from the Estate of Richard King, Sr. Richard King, Sr. was the son of Mrs. H. M. King and her husband Captain Richard King. During their respective lives they paid substantial sums to their son and conveyed him various properties. It was shown by the evidence that it was Mrs. King's practice to have all the amounts thus advanced to him entered on her books in an account kept under his name, principally represented by an open account, but in a few and smaller instances rep-

resented by promissory notes; that she also occasionally endorsed his notes for money he borrowed from others and then paid them; that during the whole history of the transaction she never had any statement sent to him or made any demand upon him for payment (Reporter's Transcript, Circuit Court of Appeals, page 5590); and that when he died and his will was probated, and the administration of his estate had, during Mrs. King's life, she never presented any claim against his estate for any of these sums (Reporter's Transcript, Circuit Court of Appeals, page 6112 and pages 7975-7977).

This suit is not a suit against his estate, but one against the Trustees on the ground that they were liable to Mrs. King's beneficiaries for failing to collect such sums. The Trustees replied, inter alia, that the sums were:

1. Mere gifts by way of advancements to her son as a part of his inheritance, and not debts;

2. That in any event she had canceled them by the terms of her Will;

3. That his estate was insolvent and they could not have collected them if they had been debts and if she had not canceled them;

4. That they were barred by limitation;

5. That they made their decisions (Reporter's Transcript, Circuit Court of Appeals, pages 15,546 and pages 15,835-15,868) of the uncollectibility in good faith, and that such decision, made in good faith, is binding under Mrs. King's Will giving the Trustees or the majority of them the power of decision.

The Master found the facts in reference to the history of the advances, and the Trial Court, in more detail, found as follows, including conclusions as to the questions of law involved:

> "(b) Paragraph Sixth of the Will recites that large advancements were made by Mrs. King and her husband (Captain King), and by Mrs. King after her husband's death, to their son, Richard King (identified in this Record as Richard King, Sr.). Plaintiffs complain that the partition should fall, because only a part of such advancements were charged against the heirs of Richard King, Sr. in the partition.
>
> "This question was considered and disposed of in the Accounting Suit (Equity 74, Main Suit).
>
> "Richard King, Sr., died September 22, 1922, about two and a half years before the death of Mrs. King. At the time of his death, such advances to him amounted to approximately $21,000, for which he had executed his notes, and approximately $255,000 open account shown by Mrs. King's books. He owed others approximately $367,000, of which approximately $161,000 was secured by liens on substantially all his real estate, except his homestead. If not insolvent at the time of his death, his financial status was bad. Paragraph Six of the Will in part reads as follows (underscoring—italics—mine):
>
> 'My son, Richard King, having already received from the estate of my late husband and myself, during his father's lifetime, a large and valuable property, both real and personal, and having had, (and now having) all of the use, profits, benefits, increase, sales and revenues of the same, for many years, and having also, since his father's death, received from me, from time to time, sums of money, property and benefits

> to a very large amount, I do now hereby give, devise and bequeath to my said son *only such parts of my estate, real and personal, as, with the property, real and personal money and benefits, already received and enjoyed by him, as above mentioned, will, in my opinion and judgment, be just to him and to his sisters, and their descendents, in the distribution and disposition of my estate, as hereinafter provided,* —I therefore do now *hereby give and devise to my said son,* Richard King, the following real estate, or property, to wit:'

"The Special Master made full findings respecting this matter, from which I quote in part:

> 'The debts of Richard King (Sr.) to persons other than Mrs. Henrietta King were never paid in full, but were refunded from time to time, and the total assets of said estate were never sufficient to pay the claims of his creditors as the total value of the real estate prior to March 31, 1935, owned by Richard King (Sr.) exclusive of his homestead, was never greater than the amount of secured debts. * * *'

"As stated by the Special Master, the $21,000 represented by the notes were in the partition charged by the trustees against the Richard King, Sr. interests under the Will, but the open account of $255,000 was not so charged. I think it is perfectly plain from Paragraph Six of the Will that Mrs. King did not intend that her son, Richard King, Sr. should pay back to her estate these advancements aggregating $255,000, and that the trustees were right." (Appendix pages 183-185.)

In addition to the portion of the Will quoted by the Trial Court in the above excerpt from his Findings and Conclusions, there is another correlative para-

graph in the Will, in Paragraph Seventh of the Will, page 38 of the Record in the Circuit Court of Appeals in No. 11718. In making her devise to her daughter Alice Gertrudis Kleberg and comparing it with what she was devising to Richard King, the Will says:

> "My loving and beloved daughter, Alice Gertrudis Kleberg, (wife of Robert J. Kleberg, Sr.) having lovingly, and faithfully devoted, practically her whole life, to my care, comfort, consolation and aid,—and having never received anything from her father or myself, as have her brother and sisters, who have been benefitted largely heretofore,—I therefore, do now hereby Give and Devise, unto her, the said Alice Gertrudis Kleberg, such parts of my Real and Personal Property, as will, in my judgment, be just to her, and her descendants, and to her sisters and brothers, and their descendants,—I therefore, do now hereby Give, Bequeath and Devise, unto my said daughter, Alice Gertrudis Kleberg, the following Real and Personal Property and Estate, to-wit:"

Accordingly, she devised to Alice G. K. Kleberg a share very much larger than that which she devised to Richard King or his children, etc.

We will briefly summarize some of the authorities involved. Richard King, Sr.'s sole devisee, his wife, did not become personally liable on these sums even if they were debts of Richard King, Sr., nor did her devisees, Richard King, Jr. and his sisters, become personally liable. The land merely passed from him to his immediate devisee chargeable with a lien to secure any debts he owed, but with no personal liability. See the exhaustive opinion of the Supreme Court of Texas in *Blinn vs. MacDonald,* 92 Texas 604; 46 S. W. 787. As above shown, Mrs. King in her Will in

fixing the amount she was devising to her son, or in event of his prior death then to his children, stated that her son had already,

> "* * received from me from time to time sums of money, property and benefits to a very large amount"

and she therefore devised and bequeathed to him,

> "* * only such parts of my estate, as, with the property, real and personal, money, and benefits already received and enjoyed by him"

would in her opinion and judgment be just to him and to his sisters and their descendants; and she again reiterated this in making her devises to her daughter Alice Gertrudis Kleberg, stating that her daughter,

> "* * having never received anything from her father or myself, as have her brothers and sisters, who have benefitted largely heretofore,—I therefore, do now hereby give and devise unto her such parts as will, in my judgment, be just to her and her descendants and to her sisters and brothers and their descendants.";

thus reiterating that in making the devise of her estate she was taking into account as the share of each respectively all moneys, properties and benefits that had been received by each during her life. Such language has been uniformly construed to effect the cancellation of any such sums as are here claimed by Petitioners to be debts of Richard King's estate.

In *Dougherty v. Rogers,* (Ind.) 20 N. E. 779, the will read:

> "I will, devise and bequeath to Philo Rogers, the young man I raised in addition to what I have already given him, the further sum of $500."

The testator held six notes signed by Philo Rogers and the executor brought suit on the notes. Rogers contended that this expression of the will operated as a release of the notes. The executor contended that the reference was to gifts and not to loans. Circumstances there, as here, were shown to the effect that the testator had taken the notes, but had never tried to collect them and evidently did not intend that they should be paid. The court held that the expression in the will released these notes and that the intention of the testator was that the young man should receive the amount that had previously been paid to him, including that evidenced by the notes, and that in addition to that he should have the legacy of $500.

The language in Mrs. King's Will was much broader than in that will. In the Dougherty-Rogers case the sums were referred to only as the amounts *given* to the devisee. In Mrs. King's Will the language is much broader, including, "* * * received from me * * * sums of money, property and benefits." Instead of limiting the same to gifts, she included all sums, *benefits,* etc. *received* by Richard King.

In *Strahorn v. Rowe,* 153 Md. 364, 138 Atl. 232, the testator after devising certain lands to his children, said:

> "I direct that all the rest and residue of my property of every kind shall be divided equally between my children, my daughter, Regina C. Rowe, having received an advance of $2,000 shall not share in this residue of my property."

The $2,000 advance was evidenced by a note secured by a mortgage on property of Regina C. Rowe, and she brought the suit to cancel it, claiming that her

father had forgiven her the debt. The court held that the language contained in the above will canceled the debt, saying that it was perfectly clear that the testator did not wish it to be repaid.

In *Nagle v. Conrad,* 96 N. J. Eq. 61; 125 Atl. 20, similar language was held to release the devisee from bringing back into hotchpotch property previously conveyed to the devisee.

In *Smith v. Ijams,* 24 N. Y. Supp. 202, adopted and affirmed by the Court of Appeals of New York, 36 N. E. 343, similar language referring merely to gifts to the devisee was held to release advances although evidenced by promissory notes.

In *Whitman v. White,* 36 Atl. 1135 (R. I.), similar language in the will, although referring merely to "advances" was held to release advances covered by promissory notes.

In *Cowen v. Adams,* (U. S. C. C. A.), 78 Fed. 536, the will specifically cancelled "advances" to the children. The testator had made a number of technical "advances" but also had furnished one of the children money by way of loans, taking his notes therefor in large sums. The executor contended that these notes were loans and not "advances" within the meaning of the will and therefore were not cancelled "by the provisions of the will cancelling advances." The Court denied recovery on the notes, saying that it was clear that the intention of the testator was to cancel any liability for all sums paid out to the children, and that they should receive at his death the amounts devised them irrespective of the amounts he might have advanced to them in any form during his life, and that whatever they had received from him was to be for-

given. The Court said that although the notes were not technically "advances", the testator used the word in the will in the sense of "furnishing" or "supplying" during his life.

Mrs. King's Will avoids such technical difficulties, for it uses broad language, including all "sums of money, property and benefits," and again "property, real and personal, money and benefits," and again "property, real and personal, money and benefits", and again, "all such things received and enjoyed by him." It is noteworthy that at the very commencement of the descriptions she avoids limiting the descriptions of items by referring to the form in which she has supplied them. Instead, she takes the description from her son's point of view, saying:

> "My son, Richard King, having already *received* from the Estate of my late husband and myself, during his father's lifetime, * * * and having also, since his father's death, *received from me,*"

so that she covers any monies and benefits *received* by him without attempting to describe or limit the means by which it was received, whether by way of advancement, gift, loan, or otherwise.

There are no Texas decisions upon the subject and consequently none to the contrary of the above authorities.

The will speaks as of the date of Mrs. King's death. *Haley v. Gatewood,* 74 Texas 281, where the will devising all property "I now own" was accordingly held to dispose of property acquired after the signing of the will but owned at the time of death. To the same effect see also *Henderson v. Ryan,* 27 Texas 674; and

Hagood v. Hagood, 186 S. W. 220, 226-7 error refused by the Texas Supreme Court.

The Executors and Trustees were here administering a Will which placed in their hands certain property to go to Richard King, Sr., if living, and if deceased to his children, stating in emphatic language that it had been reduced sufficiently in amount so that it together with what he had already received from her would constitute the share she wanted him to have from her estate, saying that it took the two together to constitute that share. Can it be said that the Trustees were acting in bad faith and dereliction of their duties in failing to sue for and collect back from Richard King, Sr. or to partition largely to the other beneficiaries these various sums which the Will had referred to as necessary to constitute the just distribution to him and his descendants intended by her?

h. Alleged Failure to Collect a $196,587 Note of Robert J. Kleberg, et al. The Findings of the Master and the Trial Court, made after considering the detailed documentary and oral evidence, were that two of the signers of this note, Robert J. Kleberg and Robert Driscoll, signed as accommodation makers for Mrs. King and never had any personal liability, and that the note as to them was duly canceled accordingly during Mrs. King's lifetime. There is a detailed summary of the facts in reference thereto, Appendix pages 110-114, Paragraph 55, subparagraph 8 of the Master's Findings. These Findings were adopted by the Trial Court, along with the other Findings of the Master, and the Trial Court again in his additional Findings, pages 196-199 of the Appendix, again summarizes the transaction and finds that the note was executed on the part of Robert J. Kleberg, Sr. and Robert Driscoll

as accommodation makers for Mrs. King and that they had no personal liability and that the note which they signed was duly canceled during Mrs. King's lifetime and that the remaining liability of the true maker Hirsch was renewed during her lifetime by other notes signed by him alone and that due diligence was exercised in making collections on that note from Hirsch. The Court commences the lengthy finding on this matter with the following:

> "Most of the happenings with respect to this note were two or more years *before* the death of Mrs. King." (Appendix page 196, emphasis by the Court.)

And in the Appendix, page 197, in the Court's Findings, after describing the cancellation during Mrs. King's life of the note referred to signed by Mr. Kleberg and Mr. Driscoll and the acceptance of a new note for the balance owing by Hirsch without any signature thereon of either Mr. Kleberg or Mr. Driscoll, the Court says:

> "Thus matters stood at the time of the death of Mrs. King. It cannot be doubted that whatever had been done was done with the knowledge and full approval of Mrs. King."

The Court then describes the collections and efforts to make further collections by suit, etc. from Hirsch, and quotes again the Findings of the Master that,

> "Mrs. King never intended that Robert J. Kleberg and Robert Driscoll should be liable upon the notes and that same were executed by them with the express understanding they would not be liable thereon and that in so far as they were concerned the transaction had been completed prior to her death * * *".

And in concluding the findings on this subject at Appendix page 199, the Court says:

> "It will be observed that the Master finds that everything that could be collected from Marx Hirsch was collected and that Mrs. King never intended that Robert J. Kleberg and Robert Driscoll should be liable on the notes, and that the same were executed by them with the express understanding that they would not be liable thereon. There is abundant evidence to support the Findings of the Master, and the action of the Trustees was proper."

The Petitioners contend that part of the testimony on this transaction having come from some of the Trustees, such testimony was improperly considered because of the statute they call the "Texas dead man's statute". That statute is quoted by them on the last page, page 42, of their Petition for Writ. That statute has been construed in a great many authorities by the Supreme Court of Texas. That Court has held that in view of this statute being a special restriction on the general rule in Texas allowing parties to suits to testify, it must be construed strictly, and will apply only to the suits and parties and testimony coming plainly within its terms. It will be noted that this statute refers only to actions against executors, administrators, or guardians and extends to actions by or against the heirs or legal representatives of a decedent arising out of transactions with the decedent. Accordingly, the courts have held that such a suit against devisees rather than heirs will not be included, because suits against devisees was not mentioned in the statute. Likewise, while suits against executors, administrators, or guardians were mentioned, suits against trustees were not mentioned. In accordance

with those decisions of the Supreme Court of Texas, the Texas Court of Civil Appeals, *Caffey's Executors v. Caffey,* 35 S. W. 738, after referring to the decisions of the Supreme Court of Texas, held that the statute did not extend to suits against trustees and the testimony as to transactions with the deceased was admissible. Again, in *Tennison v. Palmer,* 142 S. W. 948, where the suit was against the executrix of the will of her husband who would have been his sole heir, but who took under his will, and was sued individually, the court, following the above decisions of the Supreme Court of Texas, said that the statute excludes such testimony only in actions where judgments may be rendered against executors and heirs "as such", and therefore the statute was not applicable; that,

> "The rule of the statute will not be extended to include matters not clearly within its terms,"

holding that the mere fact that she was actually executrix, since she was not sued as executrix, and judgment could not therefore be rendered against her "as such", the statute did not apply. Under these well established Texas decisions, it will be seen that the statute, Article 3716, is not applicable. The Executors were not sued as such, doubtless for a very good reason that Petitioners feared that the Federal court would not have jurisdiction to settle the accounts of an executor, that being in the exclusive jurisdiction of the probate courts of Texas. The suit was against the Trustees in their capacity as Trustees, and in their individual capacities, and this particular account was an attempt to charge the Trustees personally, in their individual capacities, for negligence in failing to collect the note. Since the statute does not apply the rule to suits against executors nor to suits against them as Trustees,

their testimony was admissible under the general rule that parties to a suit (other than those covered by this statute) are not disqualified as witnesses by Texas law.

It is also to be noted that a large part of the evidence was documentary and that a large part of it was in reference to transactions with agents, still living, of Mrs. King, and other parties ample alone to support the Findings.

The attack below was principally made upon the proposition that the evidence varied by parol a written note. That apparently is not urged in the present Petition for Writs of Certiorari, but out of precaution we will cite briefly the propositions and authorities relied on in respect to that position heretofore taken by Petitioners.

First. Where the suit is not between the payee and the maker, but between the payee's devisees and third parties, the trustees, attempting to hold the trustees personally liable for negligence on behalf of the trust in failing to collect the note, parol evidence is admissible to show why the trustees believed the makers were not liable, and therefore were not negligent or guilty of breach of trust, *O'Neil v. Wills Point Bank,* 67 Texas 36, and held that although the testimony would not ordinarily have been admissible, it would be admissible to show the information upon which the party had acted and that he did so in good faith.

Second. Parol evidence is admissible to show that a promissory note is delivered for the accommodation of the payee by the maker, as well as to show that for any other reason it was delivered with the agreement that it should not constitute a liability of the maker. *Central National Bank v. Lawson,* 27 S. W. (2) 125,

Texas Comm. App., adopted by the Texas Supreme Court; *King v. Wise,* 282 S. W. 570, Texas Comm. App., adopted by the Texas Supreme Court; *McKeever v. Brooks-Davis Chevrolet Company,* 74 S. W. (2) 311; *McFarland v. Shaw,* 45 S. W. (2) 193, Texas Supreme Court; *Bosworth v. Cady,* 72 Fed. (2) 62 (7th C C A); *Lensing v. Rayzor,* 41 Fed. (2) 224 (5th C C A); *Stapleton v. Teague,* 85 Fed. 401 (5th C C A).

Third. The rule as to the varying of a written contract by parol evidence is not applicable to strangers to the instrument and since this is not a suit between Mrs. King, payee in the note, or Driscoll, Hirsch and Kleberg, signers of the original note, but between the Atwoods and persons who were Trustees, all strangers to the instrument, the parol evidence rule does not apply. *Hughes v. Sandal,* 25 Texas 162, opinion by Chief Justice Roberts; *Pittman v. Harris,* 59 S. W. 1121; *Johnson v. Portwood,* 89 Texas 235, Supreme Court of Texas, 34 S. W. 596; *Hart v. Meredith,* 65 S. W. 507; *Clayton v. Phillipp,* 159 S. W. 117; *O'Shea v. New York Railroad Company,* 105 Fed. 559; *Hankinson v. Vantine,* 152 N. Y. 20, 46 N. E. 292; *Sigua Iron Company v. Greene,* 88 Fed. 207.

i. Alleged Payment by the Estate of the Expenses of the Kleberg Town and Improvement Company. This is assigned on page 24 of the Petition. In discussing it, on page 16 of the Petition, Petitioners say that the Trustees paid $42,273.39 of telephone charges of this Company and purchased certain real estate known as the Worrell house for $2,561.21 from this Company, and they assign as their legal proposition that it was a breach of trust for the Trustees to have such transactions with a corporation, one-half of the stock of which was owned by Mrs. Kleberg. Again,

however, the alleged facts on which they base their legal proposition have been shown by the evidence and found below not to accord with the true facts. The Kleberg Town and Improvement Company was a corporation, one-half of the stock of which was owned by the Railroad Company which built the railroad through Mrs. King's lands, and the other one-half originally was owned by Mrs. King. The Company formerly owned large tracts of land, given to the corporation by Mrs. King, so that half of it inured to the benefit of the Railroad Company as part of the inducement given to it by her to run the railroad through her ranch and establish the town of Kingsville and other stations thereon. Most of its property had been sold and the proceeds divided by the corporation between Mrs. King and the Railroad Company a great many years before the death of Mrs. King. In 1918, about seven years before Mrs. King's death, she gave her half of the stock to Mrs. Kleberg. By that date, its business was almost at an end, its affairs having been practically liquidated.

Mrs. King's town office having been destroyed by fire, she moved it into the office theretofore maintained by the Kleberg Town and Improvement Company, since it no longer needed the office. The Kleberg Town and Improvement Company had had employees consisting of salesmen, etc. who had all been discharged by that date, and there were only nominal functions to be performed for the corporation. Mr. Finnegan, Mrs. King's office and financial manager, and after her death one of her Trustees, and Mr. Fromme, her bookkeeper, kept the books and attended to the small remaining affairs of that Company. Mrs. King, for the seven years before her death, and the Estate there-

after, paid the rent on the office; but practically all the furniture and fixtures, safes, bookkeeping machines, etc. belonged to the Kleberg Town and Improvement Company, which Mrs. King and her Estate used free of charge. Finnegan and Fromme were paid by the corporation approximately $100 per month each, both during Mrs. King's life and after her death. Petitioners complained below that it was improper for the corporation and Mrs. King and her Estate to each employ these same two employees. There was nothing in the Will requiring the payment by the Estate of only full-time employees. The statements of the corporation in evidence and those of the King Estate show that the volume of the business of the Company was small and that it amounted to only a fraction of one percent of the volume done by the King Estate. Yet the salaries paid to these two men by the corporation were many times that percentage in proportion to the salaries paid by the Estate. The telephone bills were paid by Mrs. King during her life and by the King Estate after her death, but the figure stated by Petitioners in their brief of $42,273.39 was the total telephone bill, including that used by the Estate. The monthly fixed local rate on a telephone bill was nominal and practically all of this bill consisted of long distance telephone charges in the large business of the Estate, transacted in so many places in Texas and throughout the country generally. The evidence shows that the corporation never had any occasion to do any long distance telephoning, as its remaining properties were small in amount, were situated in and around Kingsville, and that it had little telephoning of any kind to do. The Master finds that the joint employment and arrangement was not to the detriment of the Estate. The Finding in that particular was:

> "The business of the Kleberg Town & Improvement Company was handled by Mr. Finnegan and Mr. Fromme (they being also employees of the Estate) and each was paid a small salary for their services. The offices of the Company were maintained in the offices of the King Estate. The King Estate paid all of the rent and telephone expenses for the office and telephones used by it, and the Kleberg Town & Improvement Company. The evidence shows that only a small amount of business was transacted for the Company as compared to the business of the King Estate, and the evidence further shows that the Kleberg Town & Improvement Company had no business which necessitated long distance telephone calls. I therefore find that the expense of the trustees for rent and telephone services were not increased by reason of the use of the facilities provided by the Estate for Kleberg Town & Improvement Company." Appendix pp. 65-66.

And again, the Master finds:

> "I find that no loss resulted to the Estate by reason of its dealings with this Company." Appendix page 67.

In reference to the Worrell house, Petitioners are in error in stating that the purchase was from the Kleberg Town and Improvement Company. The property was acquired from Worrell by reason of which it was called the Worrell house. It had a lien on it of $1,398.77 represented by the assumption of a deed of trust lien held by the Kingsville Building and Loan Association, a concern in which neither Mrs. King's Estate nor the Trustees had any interest or connection whatever. $1,398.77 was paid in cash by the Estate and a part of it was applied on a small second lien owned by the Kleberg Town and Improvement Com-

pany. As found by the Master, there was a shortage of housing space in Kingsville, and the Estate needed an additional bookkeeper, wanting one Hart Mussey who was experienced in cattle ranch bookkeeping. As the Master finds, Appendix page 66,

> "Mussey lived in Hebbronville, Texas, was well acquainted with the type of business conducted by the trustees and was the best man available for the position. He refused to accept employment with the King Estate unless they furnished him with living quarters in addition to his salary. In order to make these quarters available this house was purchased, and the use of same was furnished to Mussey without charge. This arrangement began in July, 1934, and continued without interruption through August, 1939, even though Mussey's employment by the Trustees from April 1, 1935 to August, 1939 was that of keeping the books set up by the Trustees for the benefit of the plaintiffs herein."

The Trial Court adopted the Master's Findings and concluded that plaintiffs were not entitled to any judgment by reason thereof.

The Petitioners again complain that Texas statutes and laws were not applied. The State of Texas had no statute applying to trusts until nearly eight years after the expiration of Mrs. King's trust and the partition of her property, the Texas Trust Act having been adopted in 1943 and amended in 1945, and the trust having terminated and the property having been partitioned in March 1935. It is submitted that the Courts below were correct in holding that it was within the power of the Trustees, acting in good faith, to consummate these arrangements with the corporation.

j. Petitioners complaint that the Trustees have not Collected from other Partners in the Robert J. Kleberg & Company Bank a contribution for Sums Paid to the Bank.

Among the institutions organized when the railroad was brought into the ranch and Mrs. King opened her farm subdivisions and townsites was a private bank under the name of Robert J. Kleberg & Company, organized as a partnership with an unlimited liability upon each of the partners. Its activities were confined largely to the promotion of Mrs. King's development of her ranch and farm lands and the development of the towns on the ranch (Reporters Transcript, Circuit Court of Appeals, page 2090). As the Court found, Appendix pages 191-192, Mrs. King during her life, and her Estate after her death, were the principal depositors in the Bank and owned or were interested in most of the business establishments of the town, and the Bank was used largely as a clearing house for her and her Estate's affairs. The active managers of the Bank were persons other than the Trustees, chosen during Mrs. King's lifetime. During the period up to the ranching depression occurring prior to her death, the Bank paid large dividends and apparently prospered, although it was actually accumulating a large amount of frozen loans in such pioneering work of developing her enterprises. Mrs. King was a partner in the Bank, and as a partner had an unlimited joint and several liability along with the other partners and her Estate succeeded to and continued her interest therein. Under the terms of the Banking Act of 1933 temporarily placing private banks under the jurisdiction of the Federal Reserve Bank Examiners, the Federal Reserve Bank required the Bank to re-

move some of its assets. Her Estate was the principal depositor in the Bank and the only partner having a substantial account in the Bank, and the Federal Reserve required that the notes which it stated should be removed from the Bank should be charged to the account of Mrs. King's Estate, which was accordingly done. The amount is stated by Petitioners as being $499,101.13, but that includes amounts upon which Mrs. King's Estate was a guarantor and amounts which were purchased and re-collected promptly as being good notes. The actual ones charged to the account as notes and accounts required to be removed amounted to $299,824.04. As found by the Master, no other partner had then any substantial resources to contribute, and Robert J. Kleberg, Sr.'s Estate had very small, if any, net worth, and in fact was alleged by Petitioners in their pleadings to be wholly insolvent (Plaintiffs' First Amended Bill of Complaint in No. 101, Subdivision 2 (d), third paragraph of subdivision (d) in the Printed Record of No. 101 on file as part of the record in all of these cases in the Circuit Court of Appeals). In spite of this, his wife, Alice G. K. Kleberg, out of her individual funds, also contributed to the Bank to charge off other additional notes, the sum of one hundred thousand dollars ($100,000) in cash (Reporter's Transcript, Circuit Court of Appeals, pages 16,952-16,954).

The undisputed evidence showed that the deposit liabilities, being the only liabilities of the Bank, amounted to over a million and a half dollars and were still outstanding at the end of the trust. It could not be known what the other liability of each partner was until the completion of liquidation and the payment of the deposits. There is no evidence that the King

Estate or its heirs lost anything by delay in seeking contributions from other partners, and it would not be known until liquidation was completed which partner would bear the greater loss proportionately. There was no attempt to show that any claim for contribution against any partner was less collectible at the end of the trust or at the time of the trial than it was in 1934. On the contrary, the evidence in reference to financial conditions then would indicate that the worst time to attempt to make collection was during the depression then existing. There was no foundation in the evidence or the findings for the allegations and intimations by Petitioners that the probable losses on the notes or accounts referred to, as such, represented money borrowed by the individuals who were Trustees to the extent of $832,030.50, or any other sum, as stated by Petitioners on page 38 of their Petition. On the contrary, the undisputed evidence was that no loss was ever made upon any obligation of any of the individuals, executors or trustees of Mrs. King's Estate, or their families or any company in which they were interested, and all loans and obligations of Mrs. King and the Estate itself to the Bank were always paid in full. The Trial Court, after approving and adopting the Findings of the Master and quoting largely from them, found (Appendix page 196):

> "I regard it as certain that if Mrs. King had been living in 1934, when the bank became involved in trouble, she would have done the same thing that the Trustees did to save it and to prevent a bank failure in Kingsville and losses to the depositors. I think the Will is broad enough to authorize and require the Trustees to do the same thing."

The Petitioners on page 38 of the Petition contend

that, regardless of the facts, the Texas law is that Mrs. King's Estate could not continue as a partner, and cite *Altgelt v. Alamo National Bank,* 98 Texas 252. The opinion in that case does not apply to the situation here. It did not involve a trust estate or trustees, but involved an administrator acting under order of the county court. And there was no will containing a provision authorizing the carrying on of any partnership or business and the administrator's sole duty was to settle the estate as quickly as possible and deliver it to the heirs. The Supreme Court of Texas held that in such a situation the administrator could not continue a business or partnership and stated that the holding was solely on that basis, using the following language:

> "The important and controlling question is in the absence of any provision in the partnership agreement for a continuance of business after the death of one of the partners, *and in the absence of any provision in the will of Mrs. Elmendorf empowering her executor to continue the business after her death,* did the executor or administrator have authority to carry on the business?"

In Mrs. King's Estate the situation is quite different. The Will appointed Trustees and created a trust estate with the broadest powers of management, control, investment, etc., and among the powers especially authorized the Trustees,

> "* * to carry on any such business as they may deem it proper to carry on * * * and generally to do all such acts * * * as an owner similarly situated might do, not inconsistent with the provisions of this Will."

And in another paragraph of the Will, authorized the Trustees,

> "* * to, in all things, as I would or could, if living, possess, hold, have, conduct, manage, control (enumerating many powers) and generally do any and all things in the premises which I would or could do if living and personally present and acting."

The evidence demonstrated that the Trustees did consent in and join in the continuance of the banking partnership. It also showed that she herself had engaged in the banking partnership during her life. It also showed that the other large ranch owners owning similar properties engaged in all businesses, including both the private and corporate banking that Mrs. King had engaged in (Reporters Transcript, Circuit Court of Appeals, pages 8236-8259), in order to support and develop their territory just as Mrs. King and her Trustees did.

Furthermore, the evidence showed that the loans referred to were made by the Bank prior to Mrs. King's death, and that a liquidation of the Bank at the date of her death or at any time prior to the partition would have resulted in a much larger loss than one subsequent to the partition.

In the foregoing paragraphs from a to j, inclusive, we have made a partial brief summary of the vast amount of the evidence and findings in the record concerning the items alleged as breaches of trust in Petitioners' Specifications of Errors, page 24 of the Petition, and have shown that in each instance the allegations they make as to the facts on which they base their legal propositions are incorrect. To show that

we have referred principally to the Master's Findings and the Findings of the Trial Court. When Petitioners attacked those Findings in the Circuit Court of Appeals, which had before it the evidence taken before the Master and the Trial Court, we filed a brief and an index to that record, to show that plaintiffs' allegations were incorrect and that the Master's and the Trial Court's Findings were correct and supported by the great weight of the evidence. We have made few citations of the evidence taken below, because, as above stated, we are here informed that up to the time of the preparation of this brief, Petitioners have not filed that record in this Court, and they have served us only with a few pages covering the opinion of the Circuit Court of Appeals, apparently are not filing in this Court the record which they filed in the Circuit Court of Appeals, consisting of a volume composed principally of pleadings, and some 18,000 typewritten pages of court reporters' transcript of oral evidence, the great mass of typewritten and handwritten original documents, auditors' reports, and the complete books of the Estate. Therefore, we have had to refer principally to the Findings of the Master and the Trial Court, which we are filing as an Appendix to this Brief.

III

The next specification of error, on page 24 of the Petition, is the alleged failure of the Courts below to apply the Texas statutes and Texas law of trusts to the accounting and the settlement of the Estate. As we have stated above, there was no statute in existence in Texas in reference to the law of trusts at the time of Mrs. King's death in 1925, or at any time during the trust, which terminated in 1935, the Texas Trust

Act having been enacted for the first time in 1943, with amendments made in 1945. However, the record does not bear out Petitioners' claims about the manner of accounting and burden of proof referred to. The Trustees and their employees had kept an elaborate set of books, showing all the receipts and disbursements, and classifying same in the most detailed manner. When the case at its outset was transferred to the Special Master, as the basis of their accounting the trustees offered during the course of the hearing the complete books of account, and supplemented them by the following: (1) A Profit and Loss Statement annually for the entire period, showing the income per books, and the adjustments necessary, principally for capital receipts and disbursements to be used in calculating the net income of the Estate from the point of view of calculating Trustees' commissions;

(2) An audit of the books of the Estate for the trust period, approximately the first half having been prepared by Ernst & Ernst, certified public accountants (Pltffs' Ex. B) with their statement reconciling the books of the Estate with the audit (Pltffs' Ex. E); and an audit for the remainder of the period down to a date within three months of the end of the trust, prepared by other certified public accountants, F. W. LaFrentz & Company (Pltffs' Ex. C) with a statement prepared by the auditors reconciling the books of the Estate with the audit (Pltffs' Ex. F);

(3) An itemized statement of the cash receipts and disbursements for the three months period from the last auditors' report down to the termination of the trust taken from the books of the Estate (Defendants' Ex. D);

(4) The partition deeds whereby the Executors and Trustees partitioned the property to the devisees and their successors, describing the assets at the time of the partition and the amount set aside to each in great detail (Defendants' Ex. 122, 227 and 442).

(5) A schedule showing further details of items and calculations included in the partition deeds (Defendants' Ex. 218).

(6) A statement of cash receipts from the period beginning at the partition date down to the date of the trial of small items reserved from the partition to pay outstanding accounts, etc.

(7) The books of account kept by the Executors and Trustees covering the properties set aside to plaintiffs and their brother and sister (plaintiffs having failed and refused to take possession of same) for the period from the partition to the time of trial.

In addition to the above, during the hearings as requests were made for further information by Petitioners for further accounting on individual items thereon, numerous schedules prepared from the books and records of the Estate were prepared by the auditors, F. W. LaFrentz & Company, and were offered and received in evidence. The Master summarizes the accounting in further detail at Appendix pages 2-4. Additional oral evidence was taken comprising a large part of the 18,000 pages of oral testimony above referred to. Further evidence was offered before the Trial Court, both oral and written.

Petitioners quote certain portions of the Circuit Court of Appeals opinion which they contend placed all the burden of the accounting on Petitioners. That

language must be construed in connection with the claims about the accounting which Petitioners were making. Petitioners throughout contended that the books of account and the auditors' reports based thereon were no evidence whatever; that they consisted merely of self-serving declarations of the Trustees. Also, they contended that the sworn testimony of the Trustees on the witness stand and of their employees was nothing but what Petitioners termed "self-serving declarations" and constituted no evidence; and when they charged from time to time that there was no evidence of transactions, it developed that they meant that either all or part of the evidence consisted of such books, vouchers and testimony, contending that Trustees charged with fraud and misapplication of funds could not prove their innocence by their own declarations and books. They would question a witness about what a particular Mexican employee was doing to earn a day's wages appearing on the books on a certain day years before, and when the particular Trustee could not offhand recall of his own memory anything about what the books showed, Petitioners' counsel would contend that there was no evidence to justify the expenditure, etc.

It was contended that the wide powers given them in the Will to do the things they deemed best and the things that they deemed that Mrs. King herself or an owner similarly situated would do, and the power of decision, did not apply in the case of bad faith, fraud, or breaches of trust or abuses of discretion. The defendants, of course, never contended that they did apply in cases of bad faith, fraud, breach of trust, or abuse of discretion; but contended that the burden was upon the plaintiffs to prove allegations of bad faith, fraud, etc.

The question that was before the Circuit Court of Appeals was this one. It was elaborately shown that the defendants had fully accounted for all their receipts and disbursements and acts; but the question was whether the burden was upon the defendants to show that they were in good faith, or whether the burden was upon the plaintiffs. The Petitioners in their Petition herein, on page 27, complain particularly of that part of the Circuit Court of Appeals opinion, stating that Petitioners,

> "* * treated this case below and they treated it here as though the mere filing of their suit put the Trustees in the wrong and on the defensive, put upon them not only the burden of showing what they did in the course of their management of the trust estate and in respect to its partition, but that the plaintiffs' charges were false and unfounded."

That language is clear that the burden of ordinary accounting was upon the Trustees, but that the plaintiffs were seeking to put upon the Trustees the further burden that plaintiffs' charges of bad faith, fraud, etc. were false and unfounded. The Court proceeded:

> "That this is not so is so well settled as not to require the citation of authority. The Trustees have in their support the general principle that it will be presumed that persons charged with the performance of a duty have discharged it fairly and in accordance with their commission until evidence is introduced which overthrows this presumption."

It is clear that that sentence applied to the contention Petitioners were making that it was not sufficient for the Trustees to discharge the burden of "showing

what they did," but also the burden to show that the charges of fraud, etc. were false and unfounded.

Again, the Petitioners complain, on page 29 of their Petition, that the Court held that the language authorized them to act as they deemed Mrs. King herself or an owner similarly situated would do, but calls attention to the fact that under the language of the Will and the law applicable thereto this was subject,

> "* * to the limitation that they must not act inconsistently with it (the will)",

and that,

> "all questions of correctness of the accounting and the partition must be approached and examined as though Mrs. King herself had made them *under the Will.*"

Again, the Court negatives the contention here made by Petitioners that the Court was exempting the Trustees from accounting by concluding after the foregoing, that

> "In the light of these considerations and *of the full and detailed nature of accounting made by the Trustees,* we reject appellants' primary claims both as to the partition and of the accountings, that plaintiffs were entitled to a decree for failure of defendants to disprove *the charges* plaintiffs made."

It is noted that the Court qualified its holding by stating that it was made in the light of the "full and detailed nature of the accounting made by the Trustees" and it was referring only to the subject of plaintiffs' primary claims that they were entitled to a decree on the ground that defendants must disprove the

charges of fraud they had made. To show that the burden is on those seeking to show bad faith, fraud, breach of trust, or abuse of discretion, we cite the following authorities:

Maxwells heirs vs. Bolding, 36 S. W. (2d) 267.
Ladd vs. Stephens, 48 S. W. 915.
Anderson vs. Thero, 118 N. W. 47, 139 Iowa 632 (Subd. 2—disposing of land at inadequate price, amount of damages must be shown).
Offenstein vs. Gehner, 122 S. W. 715, 223 Mo. 318 (converting trust funds).
In re *Aldersley's Estate* (Calif.), 163 Pac. 206, Syl. 5-6 (spending principal).
Young vs. Baker, 127 N. Y. S. 212.
In re *Bailey's Estate,* 57 Atl. 1095, 208 Pa. 594 (paying out too much of the trust fund).
Spencer vs. Pettit (Com. App.), 2 S. W. (2d) 422 (That the trust funds purchased the land sued for).
Logan vs. Logan, 112 S. W. (2d) 515 (W. R.) same effect.
Campbell vs. Campbell, 8 Fed. 460 (that investment made in bonds).
Alderson vs. Horse Creek Co. (W. Va.), 111 S. E. 589 (attack on partition and account).
Bogart on TRUSTS, pp. 2496-2497.
Crabb vs. Young, 92 N. Y. 56 (effect of immunity clause).
North Adams Nat. Bank vs. Curtiss, 278 Mass. 471, 180 N. E. 217 (accord).

In the Maxwell case, decided by Texas courts, supra, the Court said:

"One seeking an accounting and who charges

fraud or maladministration has the burden of establishing such charges."

(Note: Petitioners cite this case as holding just the contrary of this language we quote from it.)

As stated by the Circuit Court of Appeals, the defendants had made a most "full and detailed nature of accounting". The Trial Court, after repeating and approving the findings made by the Master above mentioned, in the Appendix pages 135-136, found that the accounting on the Trustees' part was full and complete and plaintiffs' complaints were not meritorious.

We call attention also to the fact, that in addition to the items enumerated by the Court and the Master, a stipulation was made between the parties at the outset of the hearing that the audits and the auditors' reconcilements with the books and the statement of cash receipts and disbursements for the three months from the end of the audits to the end of the trust and the profit and loss statement for the trust period, Exhibit 12, would be admitted in evidence as prima facie evidence of their contents with certain exceptions as to some conclusions drawn by the auditors not material here. The stipulation is set out in the Reporters' Transcript filed in the Circuit Court of Appeals at page 613.

The Petitioners also, on this accounting matter, contend that the provisions giving the Trustees power of decision, etc. are void as against public policy, and the provisions giving them great powers which Mrs. King gave were thus void. Those provisions are quoted in the footnote to the opinion of the Circuit Court of Appeals. Petitioners are in error in contending that they are void under Texas decisions. They gave the

Trustees the power to pass upon their powers and all of their acts and duties in the premises. Under the laws of Texas, it is settled that a testator has the power to give that authority to representatives under the will. It is settled by the decisions of the Supreme Court of Texas that it extends to decisions upon meaning of the will in questions of law, as well as to questions of fact, and the Texas courts have held that even though the decision made on either a question of law or fact is different from the decision which the court would have made, the decision made by such representatives is binding where arrived at in good faith. *Couts v. Holland,* 107 S. W. 913, Texas Court of Civil Appeals, writ refused by Supreme Court of Texas; *Grant v. Stephens,* 200 S. W. 893; *Boettler v. Tendick,* 73 Texas 488. See also, *American Board of Commissioners v. Ferry* (C. C.), 15 Fed. 696.

The first cases were executor and trustee cases involving construction of a will and duties under it. The last case cited involved a power conferred on an architect to make decisions, and it is important here in that the Supreme Court of Texas held that a decision tacitly involved in acting on the matter was binding although no dispute had previously arisen. This authority answers the contention made by plaintiffs that there was no evidence of any dispute between the Trustees.

They also contend that the Trustees were disqualified to make decisions by reason of the relationship of the beneficiaries, but Mrs. King had the right to disregard that relationship and personal interest and vest this power in the Trustees in spite thereof. They also say that the language about doing whatever she

would have done, etc. means nothing and does not extend the powers otherwise conferred. In reply to these contentions, we cite *Faulk v. Dashiell,* 62 Texas 642, where the first contention above referred to was made and was overruled by the court; and *Turnbull v. Pomeroy,* Supreme Court of Massachusetts, 3 N. E. 15, opinion by Justice Oliver Wendell Holmes, where the broad language was construed as construed here, in spite of the fact that the transaction was with a company in which the trustee was interested, there being no bad faith shown.

On the proposition that the provision of the Will exempting the Trustees from liability is valid and will exempt them, except of course in the case of fraud or bad faith, we cite:

Crabb v. Young, 92 N. Y. 56
In re *Knowers Estate,* 200 N. Y. S. 777
In re *Clark's Will,* 257 N. Y. 132, 177 N. E. 397, 77 A. L. R. 499, note 42 Yale L. J. 363
North Adams Nat'l Bank v. Curtiss, 278 Mass. 471, 180 N. E. 217
Anderson v. Bean, 272 Mass. 432, 172 N. E. 647, 72 A. L. R. 959
Warren v. Pazolt, 203 Mass. 328, 89 N. E. 381
Restatement of Trusts, A. L. I. 631
Browning v. Fidelity Trust Co., (C. C. A. 3) 250 Fed. 321, cert. denied 248 U. S. 564
Benton v. Safe Deposit Bank of Pottsville, 255 N. Y. 260, 174 N. E. 648
Van Siclen v. Bartol, (C. C.) 95 Fed. 793
Thompson v. Hays, (C. C. A. 8) 11 Fed. (2d) 244
Black v. Wiedersheim, (C. C.) 143 Fed. 359
Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782

Greene v. The Continental Bank and Trust Co., 267 N. Y. 519, 196 N. E. 559, Aff'g 271 N. Y. S. 1099

The rule is well stated in the first case cited of *Crabb v. Young*. The will provided that the trustees (called executors in the will) "should not be answerable for any loss or da nage happening to the estate, except such as occurred from their willful default, misconduct or neglect." In discussing this clause the court said:

> "It is claimed that the defendants were also guilty of misconduct in the year 1876 in relation to the investment of trust funds in bonds and mortgages upon real estate in the city of Brooklyn. The complaint does not allege the carelessness or imprudence of the defendants in respect to such investments to have been 'willful', neither do the findings of the court below thus characterize the action of these trustees. It is quite clear that they cannot be held liable to replace the moneys lost through even an improvident or careless investment, unless they have acted willfully and have intentionally disregarded the rules which control and regulate the action of prudent and careful men in conducting their own business affairs.
>
> "The will of the testator expressly exempts them from liability 'for any loss or damage that may happen to my estate except the same shall occur or take place from their own willful default, misconduct or neglect.' The testator had an absolute right to select the agencies by which his bounty should be distributed and to impose the terms and conditions under which it should be done. He well knew the character and qualifications of those whom he selected as his trustees, for they were his own children, and while they were engaged in the performance of a lawful duty which he intrusted

to them, the court has not the right to increase the measure of their responsibility or impose obligations from the burden of which he has in his will so carefully protected them. We think, therefore, in the absence of any finding to the effect that the conduct of the defending Isaac H. in making such investment was willful or fraudulent, that the court below erred in holding that he was liable to replace the amount of such investment in the trust fund." Pages 65-66.

The Master and Court found and repeated again and again that the Trustees acted throughout ably with good faith and diligence.

WHEREFORE, it is prayed that the writ be denied.

Respectfully submitted,

LEROY G. DENMAN,
215 W. Commerce
San Antonio, Texas
Attorney for Respondents.

ROBERT W. STAYTON,
University Station,
Austin, Texas
MARCELLUS G. ECKHARDT,
Corpus Christi, Texas
ROBERT F. CAMPBELL,
Houston, Texas
Of Counsel.

APPENDIX

FINDINGS & CONCLUSIONS

Office - Supreme Court, U.S.
FILED
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In the

Supreme Court Of The United States

October Term, 1947

Nos. 443, 444, and 445

EDWIN K. ATWOOD and ALICE B. ATWOOD,
Petitioners,

Vs.

ROBERT J. KLEBERG, JR., CAESAR KLEBERG, RICHARD M. KLEBERG, JOHN D. FINNEGAN, SAMUEL G. RAGLAND, and RICHARD KING, Individually and as Trustees under the Last Will and Testament of Henrietta M. King, Deceased, et al.,

Respondents.

PRINTED COPY OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE FOREGOING CASES IN THE TRIAL COURT, FILED BY RESPONDENTS AS AN APPENDIX TO THEIR BRIEF

Leroy G. Denman
215 West Commerce Street
San Antonio 5, Texas
Counsel for Respondents

Robert W. Stayton
Marcellus G. Eckhardt
Robert F. Campbell
Of Counsel

APPENDIX

FINDINGS & CONCLUSIONS

I

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In order to assemble them in one volume, the Appellees have printed here as an appendix to their brief the Master's Findings adopted by the trial court and the trial court's conclusions of law in No. 11718 (Equity No. 74, Main Case, in the court below); and the trial court's findings of fact and conclusions of law in the additional cases which were tried at the same time, No. 11704 (Ancillary No. 74 in the court below) and No. 11717 (Equity No. 102 in the court below); and also the trial court's findings of fact and conclusions of law in No. 10055 (Equity No. 101 in the court below), which had been tried previously by the court below and affirmed by this Court, and which has been previously received in evidence in the court below in the trial of all of the other cases.

EQUITY 74

FINDINGS OF FACT BY WILMER HUNT, MASTER

(Filed Nov. 12, 1942)

355 (Title Omitted)

To the Honorable T. M. Kennerly, Judge of Said Court:

Comes now Wilmer B. Hunt, master in chancery in the above entitled and numbered cause and files the following as his findings of fact herein:

Mrs. H. M. King died on March 31, 1925. Immediately upon her death Richard King, Jr., and Robert Driscoll were appointed temporary administrators of her estate, and acted as such in the operation of the estate with the assistance of the persons named as trustees of the estate in the will until same was admitted to probate.

In April 7, 1925, Richard King, Jr., Robert J. Kleberg and Caesar Kleberg filed the will (Plaintiff's Ex. A) for probate in the County Court of Kleberg County, Texas, and sought appointment as independent executors without bond, they being nominated as such in the will together with James B. Wells, who had previously died (Defendant's Ex. 5). On May 6, 1925, the will was admitted to probate, and on the same date the independent executors qualified as such by taking the oath (Defendant's Exs. 6, 7, 8 and 9). On April 24, 1926 the executors filed their inventory, appraisement and list of claims (Defendant's Ex. 10) and, on

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June 30, 1930, the court entered an order approving the inventory and appraisement, closing said estate and dropping same from the docket. (Defendant's Ex. 20).

After making certain specific bequests, the will devised the residue of the estate to Robert J. Kleberg, Caesar Kle-

berg, Richard King, Jr. (the foregoing being also her independent executors), Robert J. Kleberg, Jr., Richard M. Kleberg, Samuel G. Ragland and John D. Finnegan, as trustees, to be held in trust by them and the survivors of them for a period of ten years, at which time said trustees were directed to partition the property then remaining in their hands in accordance with the terms of said will.

The trustees immediately undertook the performance of said trust and continued to act as such until March 31, 1935, at which time they partitioned the principal assets of the estate, retaining in their hands certain monies, notes and accounts receivable pending the final partition of the estate.

Books of account were kept by the defendants for the trust period and as their accounting herein defendants introduced in evidence the following:

1. A profit and loss statement for the trust period taken from the books (said statement also including certain adjustments for the purpose of calculating net income to the estate and for the purpose of calculating trustees' commissions.)

2. An audit of the books of the estate for the period beginning March 31, 1925, and ending December 31, 1928, prepared by Ernst & Ernst, Certified Public Accountants, (Plaintiff's Ex. B.) together with a statement prepared by the auditors, reconciling the books of the estate with the audit (Plaintiff's Ex. E).

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3. An audit of the books of the estate for the period beginning January 1, 1929, and ending December

31, 1934, prepared by F. W. LaFrentz & Company, Certified Public Accountants (Plaintiff's Ex. C.) together with a statement prepared by the auditors reconciling the books of the estate with the audit (Plaintiff's Ex. F.).

4. A statement of the cash receipts and disbursements for the period beginning January 1, 1935, and ending March 31, 1935, taken from the books of the estate (Defendant's Ex. D.).

5. The partition deeds whereby the executors and trustees partitioned the property to King Ranch, a corporation, successor in title to Mrs. Alice G. K. Kleberg (Defendant's Ex. 122) to Richard King, Jr., Minerva King Patch and Mary King Estill (Defendant's Ex. 442); to Edwin K. Atwood, Alice B. Atwood and Richard W. Atwood (Defendant's Ex. 227).

6. A schedule showing the details of the items and the calculations included in the partition deeds (Defendant's Ex. 218).

7. Statements showing the cash receipts and disbursements for the period beginning April 1, 1935, and ending June 16, 1939, as to the items reserved from partition (Defendant's Exs. 351 and 396).

8. The books of account kept by the executors and trustees covering the properties set aside to the plaintiffs and to Richard W. Atwood (they having failed and refused to take possession of same) for the period beginning April 1, 1935, and ending July 15, 1939 (Defendant's Exs. 469 to 473, inc.).

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In addition to the above, during the hearings, numerous schedules taken from books and records of the estate prepared by F. W. LaFrentz & Company were offered and received in evidence together with books of accounts themselves.

I find that the executors and trustees administered the trust diligently and in good faith; that the partition made by them was fair and equitable; that they have fully accounted to plaintiffs for their acts as executors and trustees except as same may be affected by the findings hereinafter made on the points raised in Plaintiffs' Bill of Particulars.

1. Compensation to The Trustees

Captain Richard King, the husband of Mrs. Richard King, died in 1885, and shortly thereafter she employed Robert J. Kleberg to assist her in the management of her affairs, evidencing his authority by the execution of two powers of attorney, the first dated January 21, 1895 (Defendant's Ex. 3), and the second dated December 3, 1919 (Defendant's Ex. 4). To assist him, she also from time to time, prior to her death, employed Samuel B. Ragland, John D. Finnegan, Caesar Kleberg, Richard M. Kleberg, Robert J. Kleberg, Jr., and Richard King.

At the time of her death Mrs. King owned approximately one million acres of land located in Kleberg, Jim Wells, Nueces, Kenedy, Willacy, Brooks, Hidalgo, Jim Hogg, Starr and Cameron Counties, with lesser tracts of land in Crain, Upton, San Patricio, Bee and Goliad Counties, Texas, and at the time of her death she had under lease approximately 175,000 acres of land. In addition, she also

owned approximately 61,792 head of grown cattle plus 359
their calves and various other assets, more fully described in the inventory and appraisement (Defendant's Ex. 10), the Federal estate tax returns, and the various adjustments thereof (Defendant's Exs. 108 to 120, inc.), and the auditor's reports (Plaintiff's Exs. B and C).

At the time of her death she owed many debts, which are itemized in the estate tax proceedings and in the audits. Estate tax returns were filed with the federal government and inheritance tax returns filed with the State of Texas, and claims for additional taxes, amounting to large sums of money, were filed by both, resulting in protracted litigation, which was finally determined in 1930 and the taxes found to be due were paid.

At the time of her death the ranch was in the process of eradicating the Texas fever tick, having been successful to a large extent upon the portions in Kleberg, Jim Wells and Nueces Counties, devised to Alice G. K. Kleberg, and upon the western portions of the southern ranch in Hidalgo, Brooks and Kenedy Counties, devised to Richard King and his sisters, but having great difficulty, and having made little headway upon the eastern portion of the lower ranch in Kenedy and Willacy Counties, devised, one-half to the plaintiffs and to their sister, Mrs. Elise Atwood Baldwin and their brother, Richard W. Atwood, and one-half to Mrs. Henrietta Wilton Page. The ranch had also commenced the development of a new breed of cattle more adapted to the ranches than were the cattle then located thereon. In order to complete the program of tick eradication, and in order to protect the property against reinfestation, it was necessary that better fences be built than had

been previously required. Likewise, large areas lacked sufficient water facilities especially those devised to the Atwoods and Mrs. Page.
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During the trust period the fences and water facilities were improved and maintained, and the breed of cattle developed and improved, both of which increased the carrying capacity of the ranch so that at the expiration of the trust there were on hand approximately 94,158 head of grown cattle, plus their calves, the quality of which was greatly superior to the cattle on the ranch at the time of Mrs. King's death.

Immediately after Mrs. King's death, the trustees employed themselves, with the exception of Samuel B. Ragland, in substantially the same employment as they had performed respectively during Mrs. King's lifetime, and continued to pay to each the same compensation as such employees, as they had received during Mrs. King's lifetime, the cash salary being $5,000.00 per year each from the inception of the trust to the end of the year 1932 at which time the salaries were reduced to $4,000.00 per year.

In addition to performing the duties required of them as executors and trustees under the terms of the will, the nature of their employment, the duties they performed and their additional compensation were as follows:

Robert J. Kleberg continued until his death in October, 1932, to exercise general supervisory control over the operations, all of the defendants being under his direction and control in accordance with the power of final decision given him in the will. He was of advanced age, and had been in ill health for several years prior to Mrs. King's

death. He did, however, continuously until the time of his death, actively participate in the management of the estate. Until his death he received the cash salary above referred to together with housing for himself and for such
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members of his family as were with him from time to time in the headquarters building located on the property owned by his wife, Mrs. Alice G. K. Kleberg, and leased by her to the estate, and was furnished with food for himself and family, the use of automobiles, gasoline, oil and repairs therefor, and servants in connection therewith at the expense of the estate, all of which he had received for many years prior to Mrs. King's death.

Caesar Kleberg, a cousin of Robert J. Kleberg, was employed by Mrs. King in 1910. He devoted his attention primarily to ranch operations on the lower or southern ranch, but in addition throughout the trust period gave his attention to other portions of the ranch, and the business of the estate as necessity arose. He had no family and lived at the Norias headquarters on the southern ranch. In addition to the cash salary above referred to, he received his quarters, food, automobiles and servants at the expense of the estate, as he had during Mrs. King's lifetime.

Richard King lived at Corpus Christi, Texas. He was an experienced cattleman, having been in the cattle business for many years on his own account, and was also an executive officer and director of the Corpus Christi National Bank of Corpus Christi, Texas, in which the estate was interested. During the trust period, he was at one time chairman of the Livestock Sanitary Commission of the State of Texas, the state organization having to do with tick eradication and the enforcement of the regula-

tions for the prevention and cure of the diseases of livestock. He was chairman of the Corpus Christi Port Navigation District, and director of the National Finance Credit Corporation of Texas in which the estate was a stockholder, and through which it financed its loans during the latter years of the trust. He devoted a considerable
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portion of his time to the affairs of the estate not only in connection with its financial transactions, but also to the cattle operations, and except for his added duties by reason of being an executor and trustee of the estate, the functions of his employments were substantially the same as they had been prior to Mrs. King's death. He was furnished no food or lodging by the estate except during such times as he was actually on the ranch. He did, however, receive milk and butter which was shipped to him daily from Kingsville. These products were furnished to him without charge by the dairy operated by Mrs. Alice G. K. Kleberg, and were transported to Corpus Christi by the Dairy Products Company without expense to the estate in most instances, but from time to time these products were shipped by express at the expense of the estate. He was furnished an automobile and a chauffeur at the expense of the estate, and when he was on the ranch was furnished with gasoline, oil and repairs therefor at the expense of the estate, but at all other times he paid these expenses out of his own pocket.

John D. Finnegan was in charge of the office management of the estate performing the same duties as he had prior to Mrs. King's death. He was also a director and officer in practically all the enterprises in which Mrs. King or her estate, was interested. He lived in his own home in Kingsville, and received no compensation in the way of

housing, food, automobiles or servants. In 1933 shortly after the execution of the lease and loans with Humble Oil & Refining Company, and the completion of his work in meeting its requirements as to title, he borrowed $22,209.00 from the estate and paid same to Robert J. Kleberg & Co., Bankers in Kingsville, Texas, in payment of notes owed by him to said bank. Notes aggregating $22,209.00 were executed by him payable to the estate, and same were can-
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celed by the estate as additional compensation for the services he had rendered during the trust. A few weeks thereafter he suffered a severe illness on account of which he could not continue his activity in the office. He was completely inactive for several months but thereafter came to the office daily for consultation with the office employees, and rendered them valuable assistance in connection with the business of the estate.

Richard M. Kleberg continued the services he had been engaged in for a number of years prior to Mrs. King's death, assisting in the management of the cattle operations of the ranch, devoting his attention to various types of work from time to time, representing the Estate in its contacts with outside businesses and other organizations and people having to do with its cattle ranching business, as he had done during her lifetime; and in the early portion of the Trust he traveled over the country extensively in connection with the Estate tax controversy, obtaining statements, affidavits, information and proof of cattle sales and ranch sales to substantiate the returns made by the estate. He also acted as the representative for the Estate, appearing before Legislative Committees on matters affecting cattle ranching and other agricultural interests, and acted as officer or director in various associations with

which the Estate was connected, including that of President of the Texas and Southwestern Cattle Raisers Association and director of the various other national associations of the various branches of the beef and agricultural interests organized for the mutual benefit of ranching and farming interests, and in the dairy associations and farmers' and ranch circles in the territory in which the Ranch is situated, having to do with the mutual betterment of the livestock and agricultural interests in that territory, all these posi-

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tions being non-salaried; represented the Estate from time to time before Commissioners' Courts and Equalization Boards in reference to tax renditions; and consulted with the others in reference to breeding operations. He had no other occupation until he was elected to Congress in 1931. After that date he was in Washington during the periods Congress was in session, except for such trips as it was necessary to make to Texas in connection with the Estate's affairs; but he continued to give attention to the Estate's affairs while away and while Congress was not in session returned to Texas and spent the major portion of his time in his duties on the ranch and in the surrounding territory. As compensation for his employment he received the following: For several years prior to Mrs. King's death and up to about a year prior to her death, he had resided principally in a ranch headquarters on the Laureles Ranch, the eastern part of the northern division of the ranch which runs along the coast line to a point about ten miles south of Corpus Christi. About a year prior to her death he and his family moved to Corpus Christi. After moving to Corpus Christi he received a household expense allowance of $250 per month, and from one to three of the ranch employees, including a chauffeur for his automobile,

from time to time worked at his house in Corpus Christi and received their pay from the Estate. At the time of the partition the sum of $31,107.22 plus interest at 6% per annum, or $8,316.57, a total of $39,423.69, advanced for these household expenses, was charged against the King Ranch, successor in title to Alice G. K. Kleberg, and collected and offset in the calculation of the heirs' indebtednesses. He also received the use of one of the ranch automobiles and gasoline, oil and repairs therefor.

Robert J. Kleberg, Jr., one of the Trustees, had for several years prior to Mrs. King's death been employed with
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duties similar to those of a general manager, and he performed those duties under the supervision of Robert J. Kleberg, and with the advice and assistance of the other persons who subsequently became the executors and trustees. After her death his employment in those duties was continued. He gave his attention to the details of the actual cattle work on the upper ranch, but frequently did the work on the lower ranch too, just as Caesar Kleberg did more of the work on the lower ranch, but frequently did cattle work on the upper ranch. He carried out the details of the breeding operations in the herds from which the new breed of cattle was developed, and did similar work with reference to the horse stock. Except for the added duties of the administration and settlement of the Estate, the functions of his employment were substantially the same as prior to Mrs. King's death. As compensation for such employment he received the following: As he had done before Mrs. King's death, he continued to live at the ranch headquarters building situated on Mrs. Kleberg's property leased to Mrs. King, received his food and the benefit of the services of the servants in furnishing the same. He

married in the year subsequent to Mrs. King's death and shortly thereafter, at his own expense, rebuilt a small cottage formerly occupied by one of the ranch employees near the headquarters building on Mrs. Kleberg's said tract, and thereafter during the Trust, with his family, resided in that house and received from the estate one-half of the cost of the food and wages of servants employed in that house. He also received the use of the ranch automobiles for himself and wife, and gasoline, oil and repairs thereon.

Samuel B. Ragland had retired from active service prior to Mrs. King's death, but still lived at the ranch headquarters building on Mrs. Kleberg's property. He was paid no salary. During his residence at the headquarters building, he received food for himself (he had no family) 366
for a few years after Mrs. King's death, then moved to his own home in Kingsville, where he resided until the time of his death in September, 1935. He did, however, devote a substantial part of his time to the affairs of the estate, advising with the other trustees in connection with the operation of the trust, and the handling of the cattle.

The executors and trustees, in addition to the particular duties outlined above frequently interchanged the same between themselves and performed them jointly with one or the other of the group whenever the necessity arose. The plans and policies of the estate were agreed to by the trustees, and except for routine details, particularly assigned to one or other of the group, all joined in final determinations affecting matters of importance to the estate.

All of the above mentioned parties were skilled in the performance of their duties. Their services were valu-

able and conscientiously rendered, and the compensation received by them of every kind was not in excess of the value of their services.

Under Paragraph X of the will, the Executors paid to themselves $111,752.76 as Commissions for four years of the trust as follows:

For	Paid In	Amount
1926	1926	$23,860.50
1927	1928	24,135.41
1928	1929	22,806.53
1929	1929	40,950.22
	Total	$111,752.76

The above payments were based upon ten per cent of the next income as shown by the books of the Estate (Ex. B, Pt. 2, pp. 16 and 17; Ex. C, Pt. 2, pp. 247 and 248).
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The commissions paid the trustees were actually less than those due during the years for which said commissions were paid. The total income for the trust period for the purpose of calculating commissions due the trustees was $2,888,154.74 and the commissions therefore due the trustees is $288,815.47 (Line 15, Defendant's Exhibit 12).

2. Traveling Expenses

During the trust period the estate expended $56,118.70 and charged same as traveling expense. It was necessary that much traveling be done in the business of the estate and that same was a proper charge. In the case of Robert J. Kleberg, Jr., Caesar Kleberg, R. M. Kleberg, Richard

King and John D. Finnegan, the moneys paid to them for traveling expenses was less than the actual expense incurred by them in the business of the estate.

3. Rent of Lands

In June of 1934 Robert J. Kleberg, Jr., as Trustee for himself and for Richard M. Kleberg, Sarah Kleberg, Henrietta K. Larkin and Alice K. East, his brothers and sisters, and for Caesar Kleberg, his cousin, purchased 107,030 acres of land, more or less, in Brooks and Kenedy Counties, known as the Encino Ranch and adjoining the Norias Ranch belonging to Mrs. Henrietta M. King, from Ed C. Lassiter.

On July 1, 1924, this ranch was leased to Mrs. H. M. King, by written agreement (Pltff. Ex. 12; Def. Ex. 168) for a period of ten years, ending June 30, 1934, at a rental of 35 cents per acre, for a year, payable semi-annually. The lease also provided that Mrs. King should keep the property in as good condition as it was in at the beginning of the lease, natural and reasonable wear and deterioration excepted.
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At this time this ranch had many valuable improvements on it, then in good condition, including a frame house and small barn, six small houses for Mexican labor, twenty-four wells of which seven were flowing wells, approximately 350 miles of fences, dividing the property into twenty-eight pastures.

Within sixty days thereafter Mrs. King placed 3,500 head of breeding cows and bulls upon the ranch, and she during her life time, and her Executors and Trustees after her death, continually used said property for ranch purposes until the expiration of the trust.

In June, 1924 Robert J. Kleberg, Jr., as Trustee for the above mentioned parties, purchased 34,934 acres of land, more or less in Kenedy and Willacy Counties, known as the Stillman or La Tordilla Ranch, adjoining the Norias Ranch belonging to Mrs. H. M. King, from the Stillman family. Simultaneously Mrs. H. M. King purchased approximately 3,200 head of cattle belonging to the Stillman family, and then located upon said ranch, and leased said property from Robert J. Kleberg, Jr., Trustee, upon the same terms as she had leased the Encino Ranch. This property was also highly improved, having upon it a frame ranch house and barn, six flowing wells and two houses for Mexican labor. Mrs. King during her lifetime, and her Executors and Trustees after her death, continuously occupied and used said property until the expiration of the trust.

I find that the use of the Encino and Stillman Ranches was necessary and advantageous to the estate and that the rentals paid thereon were reasonable.
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4. Purchases of Lands

On July 14, 1933, the estate purchased 185.39 acres of land in Kleberg County, Texas, known as the Kimmel Farm, for $13,904.27 of which $8,571.89 was paid in cash, and the balance was represented by the assumption of a note in the amount of $5,332.38 held by Dallas Joint State Land Bank. The property lay adjoining the Caesar pens, the principal shipping point in the upper ranch, was improved with a house, barns, and fences and planted in Rhodes grass. It was purchased because it was a desirable place to pasture young bulls. Title to this property

was taken first in the name of Robert J. Kleberg, Jr., for convenience and, by him, conveyed to the estate.

On June 7, 1932, the estate purchased 322 acres of land in Kleberg County, Texas, known as the Rotge land, from John C. Myrich, substitute trustee, for a cash consideration of $2,897.79 and paid delinquent taxes thereon amounting to $141.57. This property was entirely surrounded by lands belonging to the estate, and the owner made no effort to keep the property free of fever ticks. The property was purchased to eliminate the danger of reinfesting the estate property.

I find that the purchase of both of these pieces of property was to the advantage of the estate and that Robert J. Kleberg, Jr., had no personal interest therein.

5. Executors' Fees

The executors of the estate never at any time during the trust relinquished or abandoned their authority as executors and continued to act in said capacity throughout the trust.

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For their services as executors they were paid the sum of $300,000.00, divided equally between Richard King, Jr., Caesar Kleberg and the estate of Robert J. Kleberg. The amount of executor's fees was fixed by agreement, and was much less than the amount to which the executors would have been entitled to receive had same been calculated upon receipts and disbursements provided by law since the cash receipts during the trust period amounted to $18,457,356.92 (Defendant's Ex. 182), and the cash disbursements amounted to approximately the same sum.

Payment of executor's fees to Richard King was made in cash from time to time during the trust period and because same was received by him in advance of payment to the other executors, they were charged to his account. Before the termination of the trust, the notes of Richard King, Jr., and his sisters were credited with $15,216.66, which together with the moneys previously paid Richard King and charged to his account equalled the sum of $100,000.00.

The payment of executor's fees to Caesar Kleberg and the estate of Robert J. Kleberg was made as follows:

The Kingsville Land and Investment Company was a corporation engaged in the real estate business in Kingsville, Texas. It was indebted to the bank of Robert J. Kleberg in the amount of $138,020.35 on November 30, 1934, on account of notes executed by it and endorsed by Caesar Kleberg and Robert J. Kleberg. These notes were purchased by the estate on said date and were subsequently paid by application of the executor's fees due Caesar Kleberg and the estate of Robert J. Kleberg.

Kingsville Land & Investment Company was also indebted to the Corpus Christi National Bank in the amount
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of $17,943.33 at December 31, 1934, on account of notes executed by it and endorsed by Caesar Kleberg and Robert J. Kleberg. These notes were purchased by the estate on said date and were subsequently paid by application of the executor's fees due Caesar Kleberg and the estate of Robert J. Kleberg.

On February 28, 1935, Caesar Kleberg and the estate of Robert J. Kleberg were each paid the sum of $22,018.16, making the total paid to them the sum of $100,000.00 each.

6. Trustees' Debts to the Estate

1. Robert J. Kleberg

For many years prior to Mrs. King's death Robert J. Kleberg had an account on her books to the credit of which sums collected for him were placed and against which payments made to him or for his account were debited.

At the beginning of the trust there was a debit balance in this account of $20,199.82 (Exhibit B, Part 1, Page 67, and page 231—Master's Exhibit 12).

The account was continued until the death of Robert J. Kleberg at which time the debit balance was $17,162.73. Subsequent to the death of Robert J. Kleberg the account was carried in the name of his estate until the end of the trust period at which time there was the debit balance of $9,295.26, making a total indebtedness due from Robert J. Kleberg and his estate to the estate of $26,457.99.

This amount together with interest on daily balances at the rate of 6 per cent per annum amounting to $7,632.15, a total of $34,090.14 was charged against King Ranch, successor in title to Mrs. Alice G. K. Kleberg at the partition (Exhibit D122, Item XIX (21).

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2. Robert J. Kleberg, Jr.

For many years prior to Mrs. King's death, Robert J. Kleberg, Jr., had an account on her books to which payments made to him or for his account were debited and to which payments made by him were credited. At the begining of the trust there was a debit balance in this ac-

count of $711.67 (Exhibit B, Part 1, page 67). This account was continued upon the books of the estate until the end of the trust at which time there was a debit balance in the amount of $3.54. This balance was paid to the estate on July 17, 1935. Interest at the rate of 6 per cent per annum was calculated on daily debit balances of this account amounting to $1,333.32, charged to King Ranch at the partition (Defendant's Ex. 122, Item XIX 10).

3. Caesar Kleberg

For many years prior to Mrs. King's death there was an account in his name on the books. At the time of her death, the debit balance in this account was $350.12. The account was continued during the trust period and at the end of period, there was credit balance in his favor of $1.24.

At the beginning of the trust Caesar Kleberg was indebted to the estate in the amount of $500.00 being the balance due upon his note for $1,000.00, dated November 9, 1921. This note, together with all interest thereon, was paid in cash on August 7, 1929.

4. John D. Finnegan

A similar account was carried on Mrs. King's books in the name of John D. Finnegan for many years prior to her death at which time there was a debit balance in the account of $82.34. The account was continued during the 373
trust period and at the end thereof there was due the estate the sum of $2.85. This account was paid in cash on June 18, 1935.

On July 1, 1931, John D. Finnegan borrowed $2,000.00 from the estate and executed his note therefor, payable one

year from date with interest at the rate of 6¾ per cent. No principal or interest was paid thereon prior to the end of the trust period at which time same was partitioned to King Ranch and the heirs of Richard King (Def. Ex. 122, Item XV).

Prior to the death of Mrs. King, certain lots in the town of Bishop belonging jointly to Mrs. King and Robert Driscoll were conveyed to John D. Finnegan as trustee. The trustee made sales of some of the lots prior to Mrs. King's death and deposited the proceeds in her bank account. At the time of her death, Mrs. King was indebted to John D. Finnegan, trustee, in the amount of $1,009.80. During the trust period additional sums were received by the estate and credited to this account and during the same period the estate paid the taxes upon the property and debited the same to the account. On December 31, 1934, there was a credit balance of $1,363.10 in the account in favor of John D. Finnegan, Trustee.

On March 31, 1935, the estate paid to the heirs of Robert Driscoll the sum of $668.53, and cleared an equal amount from the account by charging same to profit and loss (March, 1935, J E 438), leaving a credit balance in the account of $26.04. On May 31, 1935, $8.90 was credited to the account increasing the credit balance to $34.94, one-half of which is owing to the heirs of Robert Driscoll and the balance belongs to the King Estate.
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5. Richard M. Kleberg

A similar account in the name of Richard M. Kleberg existed on Mrs. King's books for many years prior to her

death at which time the debit balance in the account was $309.25. The account was continued during the trust period at which time the debit balance in the account amounted to $735.21. In preparing the data for the partition, an item of $300.00 debited to the account by Journal Entry 380c December, 1934, was not taken into account. In the partition the amount due was erroneously stated at $435.21 with interest on daily balances at 6 per cent amounting to $288.72, a total of $723.93 which amount was charged to King Ranch at partition (Defendant's Ex. 122, Item XIX 12).

I therefore find that Richard M. Kleberg is indebted to the estate in the amount of $300.00, arising out of a cash payment made to him on May 24, 1934 (Master's Ex 13, Part C).

In November, 1931, an account was opened on the books of the estate as the R. M. Kleberg Special Account with a debit balance of $15,030.00 to record cash advances made to him during said month in that amount. At the end of the trust the balance of $15,030.00 together with interest on daily balances at the rate of 6 per cent, amounting to $3,907.80, a total of $18,937.80, was charged to the King Ranch at partition (Defendant's Ex. 122, Item XIX 13) (Master's Ex. 13, Part D).

On November 21, 1933, Richard M. Kleberg borrowed $3,000.00 from the estate, and executed his note to its order in said amount payable one year from date with interest at 6¾ per cent per annum. This note, together with interest thereon, was paid in cash on October 28, 1934.

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On December 20, 1933, Richard M. Kleberg borrowed $8,000.00 from the estate and executed his note to its order in said amount payable on February 20, 1934, with interest at the rate of 6¾ per cent per anum. This note, together with interest, was paid in cash on January 29, 1934.

6. Richard King, Jr.

Richard King, Jr., was not indebted to Mrs. King on open account at the time of her death. During the trust period the estate advanced to him on open account the total sum of $63,270.19. Of this amount, $10,363.00 was paid in cash and $51,783.34 was paid by applying executor's fees due him in said amount leaving a balance of $1,123.85 owing to the estate at the end of the trust. This amount, together with interest, on daily balances calculated at 6 per cent annum amounting to $1,500.04 was charged to Richard King and his sisters at the partition (Def. Ex. 122, Item XIX ( ).

7. Mineral Interest

On the first day of March, 1919, Henrietta M. King executed an instrument designated as Declaration of Trust and Power of Attorney, coupled with an interest in favor of Robert J. Kleberg, wherein she authorized the said Robert J. Kleberg to bargain, sell, grant, assign, and transfer all the oil, gas, sulphur, coal and other minerals and, in his judgment and discretion, to execute leases upon any of the lands then owned by her or thereafter acquired, at the same time conveying to the said Robert J. Kleberg 3/32 of all the oil, gas, sulphur, coal and other minerals in fee, and conveying the remaining 29/32 of said oil, gas, sulphur, coal and other minerals for a period of fifty years for the benefit of all such persons as she might thereafter, in writ-

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ing, designate and declare, or by will provide for; otherwise, said 29/32 to be and remain her own property and at her death, unless disposed of, to be a part of her estate (Plaintiff's Exhibit No. 454—Defendant's Exhibit No. 253).

On Jauary 16, 1933, the executors and trustees, joined by Mrs. Alice G. K. Kleberg, individually and as independent executrix of the Estate of Robert J. Kleberg, Sr., deceased, together with Robert J. Kleberg, Jr., as lessors, executed and delivered to Humble Oil & Refining Company as Lessee, an oil, gas and mineral lease covering 76,227 acres, more or less, out of the Counties of Jim Hogg and Starr in the State of Texas (being the property known as the San Antonio Viejo Ranch) for a primary term of ten years, said lease providing for the payment of a bonus of $57,170.25, and for the payment of annual rentals of fifty cents per acre (Plaintiff's Ex. No. 719).

On the 27th day of January, 1933, a contract was entered into between the above named lessors and the lessee with reference to the above described property, wherein it is stated that part of the property covered by said lease was originally sold by the State of Texas on a mineral classification covering 8,049.3 acres of land, and authorizes the lessee to retain one-half of the bonus paid for said lease apportionable to the land included therein, which was sold on the mineral classification on an acreage basis, and to pay the same to the Commissioner of the General Land Office of the State of Texas, and to deduct one-half of the rentals payable under said lease apportionable in the same amount and to pay same to the Commissioner of the General Land Office, and further to pay to the State of Texas one-half of the royalties payable on oil, gas and other

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minerals (Plaintiff's Ex. No. 792—Defendant's Ex. No. 440).

On September 26, 1933, the executors and trustees, joined by Alice G. K. Kleberg, individually and as independent executrix of the Estate of Robert J. Kleberg, Sr., deceased, and Robert J. Kleberg, Jr., and Richard Miffling Kleberg as advisory executors of said estate, executed and delivered to Humble Oil & Refining Company, an oil, gas and mineral lease covering 971,711.43 acres situated in Kleberg, Jim Wells, Nueces, Brooks, Kenedy, Hidalgo, Willacy, Starr, Jim Hogg, Goliad and Bee Counties, Texas, for a primary term of twenty years and so long thereafter as oil, gas or other minerals is produced from certain areas selected by the lessee in accordance with Paragraph II of said lease (Plaintiff's Ex. No. 440—Defendant's Ex. No. 240).

On September 26, 1933, the above named parties executed another oil, gas and mineral lease in favor of the Humble Oil & Refining Company and covering 18,039.63 acres of land in Kenedy, Brooks, Starr and Jim Hogg Counties, Texas, being lands patented by the State of Texas under the mineral classification law, and having a primary term of twenty years and so long thereafter as oil, gas and other minerals may be produced from said land, and providing for the payment of ten cents per acre to the State of Texas as an annual rental for the purpose of defraying drilling operations during the primary term of said lease; said lease further reserving to the lessors the usual one-eighth royalty, but providing that out of the royalties on oil and gas that the lessee shall account to the State of Texas for its one-sixteenth royalty as provided in Art. 5368, R. C. S. of Texas 1925.

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On September 26, 1933, Alice G. K. Kleberg, a feme sole, as lessor, executed in favor of Humble Oil & Refining Company as lessee, an oil, gas and mineral lease covering 30,439.23 acres of land in Kleberg County, Texas, for a primary term of twenty years and so long thereafter as oil, gas or other minerals is produced from certain areas selected by the lessee in accordance with Paragraph II of said lease (Plaintiff's Ex. No. 448—Defendant's Ex. No. 247).

On September 26, 1933, Robert J. Kleberg, Jr., individually and as trustee, as lessor, executed and delivered to the Humble Oil & Refining Company, as lessee, an oil, gas and mineral lease covering 131,005.59 acres of land (being the Lasater and Stillman Ranches, purchased by Robert J. Kleberg, Jr., as trustee, referred to in Paragraph 3 hereof) for a primary term of twenty years and as long thereafter as oil, gas or other minerals is produced from certain areas selected by the lessee in accordance with Paragraph II of said lease (Plaintiff's Ex. No. 447—Defendant's Ex. No. 246), all of the above mentioned leases providing for the payment of the usual one-eighth royalty in the event of production of oil, gas or other minerals, except as to the land sold by the State of Texas under mineral classification.

On September 26, 1933, the executors and trustees of the King Estate executed and delivered their two certain promissory notes, payable to the order of the Humble Oil & Refining Company at Houston, Texas, as follows:

Note No. One in the amount of $500,000.00, due on or before five years from date, with interest payable semi-

annually at the rate of five per cent per annum, and at the rate of eight per cent per annum after maturity until paid, 379
and containing the usual ten per cent attorney's fees on the balance due if the note is placed in the hands of an attorney for collection, etc. (Plaintiff's Ex. No. 451—Defendant's Ex. No. 250).

Note No. Two in the amount of $3,000,000.00, with interest at the rate of eight per cent per annum after maturity, and containing the usual attorney's fees clauses, payable in installments of $150,000.00 at the expiration of each year, beginning ten years after date, and the balance on or before twenty years after date, and further providing that the payee would pay to the makers interest at the rate of five per cent per annum, payable semi-annually as it accrues upon each of the installments of principal paid upon said note from the date thereof until the end of twenty years from the date of the note (Plaintiff's Ex. No. 452—Defendant's Ex. No. 251).

On the same date the executors and trustees of Mrs. King's Estate, together with Alice G. K. Kleberg, individually and as executrix and Richard M. Kleberg and Robert J. Kleberg, Jr., as advisory executors of the Estate of Robert J. Kleberg, Sr., deceased, executed a deed of trust, wherein there was conveyed to N. K. Robb as trustee for the use of the Humble Oil & Refining Company, for the purpose of securing the debt evidenced by the said above described notes, covering 980,890.73 acres of land, said deed of trust also providing for the partial release of the lien created thereby for all payments made upon the principal of the above described notes at the rate of $4.00 per acre for the portion to be released, and granting to the trustee

the power of sale in the event of default of the payment of said notes and interest thereon, or the failure to pay taxes upon the property covered thereby.

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On September 26, 1933, the executors and trustees of the King Estate, joined by Alice G. K. Kleberg, individually and as independent executrix, Richard M. Kleberg and Robbert J. Kleberg, Jr., as advisory executors of the Estate of Robert J. Kleberg, Sr., Deceased, and Robert J. Kleberg, Jr., individually and as trustee (the Lasater & Stillman properties) entered into a contract with the Humble Oil & Refining Company, affecting the three oil, gas and mineral leases of even date therewith, wherein it was agreed that during the first five years of the primary terms of said leases the Humble Company was under no obligation to do exploratory work upon the lands covered thereby, but that during said twenty year primary term the Humble Company is required to explore the leased area as diligently as it can by its geological and geophysical technique, but that no exploratory work by drilling is required except to drill an offset well as implied by the terms of the leases. That in the event of the discovery of oil and/or gas, the Humble Company agrees to keep the property developed with reasonable diligence as specified in the leases, and to produce from said leased premises that portion of the company's total production in the State of Texas as the proven reserves of the leased premises are of the total proven reserves of the Humble Company in the State of Texas from time to time.

The contract further provided that all three of the above named leases should be treated as one lease in developing and operating the property should substantially all of the land covered thereby be brought or consolidated into

one ownership and that the provisions of the contract hereafter mentioned, with reference to the retention of certain portions of the royalties by the Humble Oil & Refining Company as its own property during the second ten-year
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period of the primary term of the leases should also be treated as consolidated and that the sum so retained should be made out of the proceeds of any royalties derived from any of said lands, instead of the lands included in any particular lease (Plaintiff's Ex. No. 793).

On September 26, 1933, the executors and trustees of the King Estate, Alice G. K. Kleberg, individually and as independent executrix, and Richard M. Kleberg and Robert J. Kleberg, Jr., as advisory executors of the Estate of Robert J. Kleberg, Sr., entered into a contract with Humble Oil & Refining Company with reference to the lease covering 971,711.43 acres of land, and the deed of trust securing the payment of the above described notes, wherein it is provided that the annual rental on said lease for the twenty-year period is the sum of $127,824.60, and that the same further provided that the executors and trustees of the King Estate have borrowed from the Humble Company th sum of $2,723,645.52 as represented by the $3,000,000.00 note. The interest rate on this loan is five per cent per annum and that the rental accruing under the terms of said lease should be applied upon and offset against the interest accruing upon said note and that after applying and offsetting said rental for the twenty-year period, the total net amount to be repaid by the executors and trustees upon said note will amount to $3,000,000.00, at the expiration of twenty years, and further providing that the Humble Company will compensate the executors and trustees for interest and rentals on the required or voluntary prepayments

stipulated in said note as may be made before the expiration of twenty years at the rate of five per cent per annum, payable semi-annually as it acrues, from the date said payments are made to the expiration of twenty years from this date.

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The contract further provides that said $3,000,000.00 note is also secured by the royalties retained by the lessors in the lease covering 980,890.73 acres of land and that should oil, gas or other minerals be produced and saved from said premises at any time time prior to the discharge of the indebtednesses secured by the deed of trust, the Humble Oil & Refining Company shall have the right, during the first ten years from the date of this contract, to apply the proceeds of the royalties upon the notes secured by said deed of trust, and that during the second ten-year period from the date thereof, the Humble Oil & Refining Company should have the right to retain the proceeds of such royalties to the extent of $127,824.60 each year and to apply all royalties in excess of said sum upon said notes, but that should such royalties in any year during said second ten-year period be less than $127,824.60, the deficiency should not be carried forward into the succeeding year, and that after the expiration of twenty years, if any portion of said notes is still unpaid, the Humble Company shall have the right to apply the royalties upon said notes so long as any portion thereof is unpaid (Plaintiff's Ex. No. 442—Defendant's Ex. No. 241).

On September 26, 1933, Alice G. K. Kleberg and Robert J. Kleberg, Jr., individually and as trustee, entered into a contract with the Humble Oil & Refining Company, whereby it was agreed that the royalties accruing to Alice G. K. Kleberg and Robert J. Kleberg, Jr., individually and as

trustee under the leases executed by them in favor of the Humble Oil & Refining Company of even date therewith before the complete payment and discharge of the note executed by the King Estate, shall be applied to the purchase by Alice G. K. Kleberg and Robert J. Kleberg, Jr., Trustee, respectively, at par, of such portion of said note as the proceeds of said royalties may amount to, such por-
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tion of said note so purchased to be transferred to said parties by Humble Oil & Refining Company, without recourse, and all amounts so transferred to be subordinated to the portion of said notes retained by the Humble Company, secured by said deed of trust, the Humble Company agreeing to pay to Alice G. K. Kleberg and Robert J. Kleberg, Jr., Trustee, interest at the rate of five per cent per annum from the date of such purchase until the same is paid by the King Estate. If, however, at the time of the accrual of any royalties any portion of the $500,000.00 note is still unpaid, said proceeds shall be applied to the purchase of the said $500,000.00 note, without obligation on the part of the Humble Company to pay interest upon said purchase; and further providing that during the second term of said leases the Humble Company should retain in its hands proceeds of any royalties accruing thereunder to the extent of $22,175.40 each year, and that such deduction should be made before applying any of the proceeds from such royalties on said notes, but that should such royalties not equal said sum, the deficiency between such royalties and the $22,175.40 shall not be carried forward into succeeding years. (Plaintiff's Ex. No. 449—Defendant's Ex. No. 248).

On September 26, 1933, the executors and trustees of the King Estate executed an agreement with Humble Oil

& Refining Company, agreeing to keep the purchase contracts with the State of Texas on all unpatented lands included in the lease in good standing and to pay principal and interest thereon promptly when due, and also obligated themselves to carry out the contracts with the State of Texas on the land sold by the State of Texas under mineral classification (Plaintiff's Ex. No. 444—Defendant's Ex. No. 243).

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Robert J. Kleberg, Jr., individually and as trustee, executed a similar contract covering the unpatented and mineral classification leases in the Lasater and Stillman Ranch (Plaintiff's Ex. No. 450—Defendant's Ex. No. 249).

On September 26, 1933, the executors and trustees of the King Estate entered into a contract with Alice G. K. Kleberg as executrix of the Estate of Robert J. Kleberg, Sr., deceased, wherein it was agreed that the Estate of Robert J. Kleberg, Sr., deceased, was entitled to 3/32 of the annual rental payable by the Humble Oil & Refining Company under the terms of its lease, covering the 971,711.43 acres of land, which rental, over a period of twenty years, discounted to its present value, at the rate of five per cent per annum, amounted to $149,341.50, which sum the executors and trustees agreed to pay one-half upon the execution of the agreement (September 26, 1933) and the remaining one-half to be paid on January 2, 1934.

On September 26, 1933, the executors and trustees of the King Estate executed an agreement with the Humble Oil & Refining Company, subordinating the liens held by the executors and trustees of the said estate to the lease to the Humble Oil & Refining Company covering 917,711.43 acres, arising out of the purchase by Alice G. K. Kleberg

of the Page and Baldwin interests in the King Estate (Plaintiff's Ex. No. 453—Defendant's Ex. No. 452).

As a result of the above transactions, Humble Oil & Refining Company paid to the trustees of the King Estate the sum of $3,223,645,52, which, plus the discount of $276,354.48, equals the $3,500,000.00 debt, evidenced by the above described notes. All of the proceeds 385
of this loan were deposited with the San Antonio Loan & Trust Company and applied in part as follows:

Bills Payable:

San Antonio Loan & Trust Company	$1,497,000.00
San Antonio National Bank	60,000.00
National Finance Corporation	1,562,246.89

Interest Paid:

San Antonio Loan & Trust Company	30,190.88
San Antonio National Bank	1,136.25

(J. E. 801, November 1933—Journal No. 4)

Pursuant to its agreement, the estate paid to Mrs. Alice G. K. Kleberg, Independent Executrix of the Estate of Robert J. Kleberg, deceased, the sum of $74,670.75 on October 3, 1933, and a like sum on June 19, 1934. I find that it was necessary and advisable for the estate to purchase the rentals due Mrs. Kleberg as executrix in order to consummate the above described transaction with Humble Oil & Refining Company, that same was entered into in good faith by the executors and trustees and that no loss resulted to the estate therefrom.

8. Improvements on the Encino, Stillman and Ball Ranches

The Encino and Stillman Ranches were leased by the estate from Robert J. Kleberg, Jr., Trustee, as described in Paragraph 3 hereof, and the Ball Ranch was leased from W. B. Ball, et al., as described in Paragraph 52 hereof. During the trust period the estate expended $77,099.40 for new improvements on these ranches as follows:

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Fences and corrals	$42,655.45
Windmills	1,601.39
Water troughs	15,080.03
Wells	9,111.79
Dirt Tanks	180.00
Cisterns	450.00
Dipping Vats	16,030.98
Machinery	110.00
Automobiles and Trucks	6,279.76

and, in addition thereto, expended the sum of $64,872.01 for repairs thereon as follows:

Buildings	$27,073.91
Water Facilities	26,442.12
Fences	35,455.93

I find that the new improvements placed on the above ranches were necessary to the economical operation of said properties and that the cost thereof was reasonable; that the repairs made to said property were in accordance with the terms of the contracts under which same was leased by the estate and were necessary for the proper operation of the properties and that the cost thereof was reasonable. I further find that in spite of the sums expended for re-

pairs and improvements said improvements were worth less at the end of the trust than they were upon the dates of the respective leases.

9. Improvements on the Santa Gertrudis Ranch

During the trust period the estate expended the sum of $451,115.81 for the purpose of improving the 174,791.36-acre tract owned by it and the 30,439.23 acres leased by it from Mrs. Alice G. K. Kleberg, known as the Santa Gertrudis Ranch, as follows:

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Buildings and barns		$ 59,505.90
Fences and Corrals		141,569.24
Windmills		19,044.12
Water Troughs		38,501.10
Wells		61,931.27
Cisterns	(Red figure)	95.27
Dipping Vats		3,971.33
Machinery		64,442.09
Wagons and Harness		2,988.23
Telephone Line		528.44
Automobiles and Trucks		38,160.88
Furniture and Fixtures		1,969.81
Water System		1,935.60
New Highway		16,663.07

(Defendant's Ex. 37.)

At the partition the cost of the new Highway ($16,663.-07) was deducted from the improvement account and charged to Mrs. Alice G. K. Kleberg (Defendant's Ex. 122, Item XIX (22)) making the net cost of new improvements $434,452.74. The books do not differentiate the improvements made on the 30,439.23-acre tract from those made on the larger tract.

I find the improvements made to these properties were made in good faith by the executors and trustees, that same were necessary to the economical operation of said properties and that the cost thereof was reasonable.

During the trust period the estate also expended the sum of $236,891.30 for repairs to the improvements upon the Santa Gertrudis Ranch including the 30,439.23-acre tract leased from Mrs. Kleberg as follows:

Buildings and Barns	$78,132.90
Water Facilities	62,292.37
Fences and Corrals	96,466.03

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I find that such repairs were made in good faith by the executors and trustees and were necessary for the economical operation of the properties; that such repairs as were made to the improvements on the 30,439.23-acre tract were less than those reasonably called for under the terms of the lease and that the improvements on the 30,439.23-acre tract were less valuable at the end of the trust period than they were at the beginning thereof in spite of the repairs and improvements to same.

10. Santa Gertrudis Operating Expense

I find that the estate did not pay any part of the expense of maintaining and operating the Santa Gertrudis Jersey Farm belonging to Mrs. Alice G. K. Kleberg; that such expense was paid by Mrs. Kleberg and forms no part of the Santa Gertrudis operations account on the books of the estate.

The Santa Gertrudis operating expenses did include, however, the expense of maintaining and operating other

livestock belonging to Mrs. Alice G. K. Kleberg located on the 30,439.23-acre tract leased by the estate.

In spite of the fact that such livestock had been given to Mrs. Kleberg by Mrs. King and had also been devised for immediate delivery to her in Paragraph Seven of the will, the executors and trustees retained possession of same during the entire trust period. The estate at all times had the use of the breeding horses and the bull herds from which most of the horses and bulls used on the entire estate were raised and the breeding cattle from which the new breed of cattle was developed. The estate from time to time sold 389
livestock belonging to Mrs. Kleberg without compensation to her.

I therefore find that the expense of operating and maintaining the livestock owned by Mrs. Kleberg was a proper charge against the estate.

11. Taxes Paid by the Trustee

Under the terms of the agreement with Mrs. Alice G. K. Kleberg whereby the Estate leased the 30,000 acres known as the Santa Gertrudis Ranch, the Estate was obligated to pay all the taxes levied thereon in addition to the rent.

The total amount of taxes becoming due during the trust period on this property was $58,921.37, of which the Estate paid $34,389.10, leaving a balance of $24,532.77 unpaid under the contract (Master's Exhibit 74).

Mrs. A. G. K. Kleberg assessed her property for tax purposes separately from the property belonging to the Estate, and also assessed the properties owned by her but used by the Estate separately from her properties which were not used by the Estate. The Trustees

paid no taxes upon any personal property owned by Mrs. Kleberg, but on occasion paid taxes for Mrs. Kleberg and charged same to her as an Account Receivable.

I find that the estate paid no taxes upon the Encino and Stillman Ranches leased to it by Robert J. Kleberg, Trustee.

12. Loans and Advances to Beneficiaries.

Richard W. Atwood, a grandson of testatrix, the brother of plaintiffs and of Mrs. Elizabeth A. Baldwin, was an inmate of a sanitarium as a person **non compos mentis** at 390
the time of the death of Mrs. H. M. King, and continued as such during the period of the trust. In order to maintain him, it was necessary that the estate advance to the sanitarium for his account from time to time the sum of $19,268.17 in excess of the monthly bequest of $300.00 given him in the will. These advances were made with the consent and approval of plaintiffs and in making same the executors and trustees relied upon such acquiescence and consent.

Elizabeth A. Baldwin, a granddaughter of testatrix, was advanced the sum of $100.00, in excess of the monthly bequest of $250.00 given her in the will. During the period from April 23, 1926, to May 26, 1929, the estate advanced to her the sum of $24,000.00 on open account. On the 30th day of November, 1929, Mrs. Baldwin sold her interest in the estate to Mrs. Alice G. K. Kleberg for the sum of $180,000,00 and pledged the vendor's lien obligation to secure all advances made and to be made to her. As a part of the consideration for this conveyance, Mrs. Baldwin's

notes in the amount of $24,000.00 and interest of $4,605.16, totaling $28,605.16 were charged to Mrs. Kleberg in an account known as the Mrs. R. J. Kleberg "Baldwin Account."

Subsequently, the executors and trustees from time to time paid Mrs. Baldwin the total sum of $8,283.17, and charged same to Mrs. Kleberg in an account known as the Page-Baldwin Loan account. On December 7, 1930, the estate loaned Mrs. Baldwin $600.00 on her note due one year from date. Cash payments reduced said note to $34.17, which note was reserved from the partition by the executors and trustees.
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Mrs. Henrietta Welton Page, a granddaughter of the testatrix, was advanced the sum of $40,560.60, in excess of the monthly bequest of $300.00 given her in the will. Of this amount, $9,800.00 was reduced to a note dated February 1, 1927, and $12,820.15 was paid in cash by Mrs. Kleberg in 1929, leaving a balance due of $17,840.45.

At the time of Mrs. King's death, Mrs. Page owed her $27,000.00 on notes receivable. During the trust period, the executors and trustees made additional loans to her in the amount of $41,600.00 prior to the 12th day of March, 1929, at which time she sold her interest in the estate to Mrs. Alice G. K. Kleberg for the sum of $635,715.00, and pledged the vendor's lien obligation to secure all advances made and to be made to her.

Subsequently, the executors and trustees, from time to time, paid to Mrs. Page the total sum of $36,237.66, and charged same to Mrs. Kleberg in the Page-Baldwin loan account.

Mary King Estill, a granddaughter of the testatrix, and R. G. Estill, her husband, were advanced $400.00 on open account, and borrowed money represented by notes aggregating $11,000.00. They, also, together with J. D. Patch and wife, Minerva King Patch, also a granddaughter of the testatrix, borrowed $10,500.00 from the estate upon their promissory note. Of this amount $3,500.00 was credited thereon as a part of the executor's fee due Richard King, Jr., (See Paragraph 5 hereof), leaving a balance of $7,000.00.

Minerva King Patch and husband, J. D. Patch, were indebted to Mrs. King on notes receivable in the amount
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of $1,800.00. They subsequently executed additional notes aggregating $21,050.00, making a total of $22,850.00 due the estate.

J. D. Patch borrowed $1,800.00 from the estate upon his note and $334.70 upon open account.

At the expiration of the trust, all of the above items together with the indebtedness owing the estate by Mrs. Kleberg and by members of her family which were assumed by her and by the other persons interested in the estate, were paid together with interest at the rate of 6 per cent per annum by charging same against each of the beneficiaries, and, in partition, collected same by offsetting and crediting in favor of each of them the share he would be entitled to receive from the others and receiving the net amount in cash due him from each beneficiary (Item XIX, Partition Deed, Defendant's Ex. 122).

13. Alice G. K. Kleberg

For many years prior to Mrs. King's death, Mrs. Alice

G. K. Kleberg had an account on her books to which were debited amounts paid to her or for her account and to which were credited payments made by her in cash, or moneys due her from Mrs. King. At the time of Mrs. King's death, the debit balance in this account was $27,460.24. The account was continued until the end of the trust period at which time there was a credit balance in favor of Mrs. Kleberg in the account amounting to $10,649.12. At the partition interest at the rate of 6 per cent on daily balances in the account was calculated resulting in a net credit balance of $8,439.88 (Defendant's Ex. 122, Item XIX 20).

In October, 1931, an account was opened on the books of the estate in the name of the Santa Gertrudis Dairy 393
Farm which was operated by Mrs. Kleberg to which were debited supplies furnished the dairy by the estate, and to which was credited cash paid by Mrs. Kleberg, and feed furnished the ranch for the care of its live stock, and milk sold the ranch (at less than the market price) for the use of its employees. During the trust period these accounts were paid in due course of business and the balance therein was frequently in favor of Mrs. Kleberg.

At the end of the trust there was a balance of $17.94 due the estate. On April 1, 1935, Mrs. Kleberg paid the estate on this account $5.12 and on July 17, 1936, she paid the estate the remaining balance of $12.82.

On October 28, 1918, Mrs. H. M. King conveyed to Mrs. Alice G. K. Kleberg by deed of gift 30,439.23 acres of land known as the Santa Gertrudis Ranch, together with other lands in Kleberg and Jim Wells Counties, Texas (Defendant's Ex. 11).

On January 1, 1919, Mrs. Kleberg leased the above-mentioned property to Mrs. King for a period of one year ending January 1, 1920, for a cash rental of $10,000.00 per year payable semi-annually, the lessee to pay all taxes accruing upon the leased property and to keep the buildings, fences, farms and other improvements thereon in as good condition as they then were. (See copy of lease attached to Master's Exhibit 64.)

At the time of this lease the property was used as the headquarters for all of Mrs. King's ranching business and was highly improved with employees' dwelling, barns, warehouses, garages, silos, feed racks, storage buildings, machine and blacksmith shops, at which automobiles, trucks 394
and machinery, etc., were serviced and repaired and equipment used by the ranch was manufactured, as well as the home in which Mrs. King and the members of her family resided. The property was well watered, divided into small pastures, many of which were planted in Rhodes grass, upon which the breeding herds which provided the principal bulls for the herds were raised and pastured; and into farm lands occupied by tenant farmers and by her own employees upon which were raised substantial feed crops necessary for the proper care of the breeding herds. The property was located adjacent to the city of Kingsville and adjoined both the Laureles and Santa Gertrudis 174,000-acre ranch.

During her lifetime Mrs. King kept the above mentioned lease in force and after her death, the estate continued to use the property under the same terms and conditions. The headquarters building located upon the property was occupied by Robert J. Kleberg and such members of his

family as lived with him from time to time including Mrs. Sarah Kleberg Shelton and Mrs. Alice Kleberg East, his daughters and their families. Subsequent to his death Mrs. Alice G. K. Kleberg continued to occupy the home until the end of the trust. The headquarters house was also the place where large numbers of the employees and persons having business with the ranch were lodged and provided for. During the trust period Mrs. Alice G. K. Kleberg supervised the maintenance of the headquarters house and the house kitchen at which many of the employees of the ranch were fed, entertained the guests and business associates of the ranch, and therefore rendered valuable service to the estate.

It appears from the record that it is not possible to segregate the cost of the food and lodging furnished Mrs. 395
Kleberg and the members of her family who resided with her after her husband's death from the cost of providing the same facilities to the employees of the ranch. However, such cost was only a small fraction of total expense carried in an account known as the House Kitchen account as a part of the Santa Gertrudis operations.

I find that the use of the headquarters property was advantageous to the estate; that had same not been used, other facilities similar in nature would have had to be provided; that the reasonable rental value of the property was not less than $75,000.00 per year; that the amount of rentals paid by the estate for the use of the property, including taxes, repairs, new improvements and food and lodging furnished Mrs. Alice G. K. Kleberg, such of her family as lived with her from time to time, was far less than the reasonable rental value thereof.

I further find that the items included in the Santa Gertrudis operating accounts known as "House and Yard Expense," "General Expense" and "Garage, Machine Shop, and Blacksmith" are proper charges against the estate; that the cost of operating the store and warehouse upon the property was not incurred for the purpose of furnishing service to Mrs. Alice G. K. Kleberg and others not connected with the estate but were proper and necessary expenses incurred in the operation thereof.

The employees whose pay was recorded as "day labor" were not servants of Mrs. Alice G. K. Kleberg but were persons who were not on the regular pay rolls of the estate and whose services were employed to the estate from time to time as necessity arose.
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14. Alice L. and T. T. East

Alice L. East, the wife of T. T. East, was the daughter of Mrs. A. G. K. Kleberg and a granddaughter of Mrs. H. M. King. On March 31, 1925, Mrs. King was indebted to Alice L. East in the amount of $400.00 with accrued interest to March 31, 1925 of $64.00 represented by a note dated April 2, 1923, due April 2, 1925. Various sums of money were loaned the estate by Mrs. East from time to time during the trust period, the balance due of $3,952.56 principal, and $243.12 interest being paid on February 13, 1935 (Exs. B, C and D).

At the time of Mrs. King's death Mrs. East was not indebted to her in any amount, but subsequent to March 31, 1925, she owed the estate various sums of money, the total debits to her account being $2,236.53. Payments on this account were made in cash from time to time reducing

the balance due at the end of the trust period to $1,543.69 (Exs. B and C). This balance with interest at 6 per cent calculated on daily balances amounting to $312.29 was charged against and collected from King Ranch (Defendant's Ex. 122, Item XIX (4)).

A. (Arthur) L. East was indebted to the estate between the years 1929 and 1933 by reason of accounts receivable in the amount of $19,870.09 representing cattle sold to him. These items were promptly paid in cash in due course of business.

On March 31, 1925, T. T. East was indebted to Mrs. King in the amount of $983.54 of which amount $887.12 was an erroneous charge (Plaintiff's Ex. 181—Defendant's Ex. 397
354). This amount was credited to the account leaving a balance of $99.97. Additional amounts totaling $1,626.83 were debited to this account during the period ending December 31, 1928, all of which were paid off in cash (Ex. B, 1st part, p. 70).

On March 25, 1922, T. T. East joined by his wife, Alice K. East, conveyed 75,196.17 acres in Starr and Jim Hogg Counties, Texas, known as the San Antonio Viejo Ranch to Mrs. H. M. King for a recited consideration of $500,000.00 represented by the cancellation of a note executed by East payable to Mrs. King in the amount of $439,855.00 secured by a lien on the above described land, $50,943.07 owed by East to Mrs. King on open account and $9,201.93, being pasturage owed Mrs. King, and the assumption of certain prior liens upon the property.

In May, 1924, Mrs. King leased the above mentioned property to East for $15,000.00 per year (Plaintiff's Ex.

14). This arrangement was continued until May 1, 1931. Of the sum of $105,000.00 rental earned during this period $29,993.96 was paid to Mrs. King or her estate in cash, leaving a balance of $75,006.94 unpaid. This amount includes the item of $38,982.64 shown on page 85, Ex. B, part 1.

During the time East had the property under lease he had improved it by the expenditure of his own funds and when the lease was terminated by the estate, the executors and trustees valued these improvements at $63,763.00 and credited the East land rental account in that amount, by J. E. 312, October 31, 1931, leaving a balance of $11,243.04 which was charged to East on the accounts receivable ledger (M. Ex. 46). There were total debits to East on the accounts receivable of the estate from July 31, 1929, to 398
December 31, 1934, of $18,002.22 including the items of $11,243.04 mentioned above. Credits of $3,604.23 were entered to said accounts prior to the end of the trust as follows:

Buick automobile	$ 707.00	(J. E. 637 March 1933)
Automobile license	36.46	(J. E. 652 April 1933)
Expense	20.00	(J. E. 847 Dec. 1933)
Cash	2840.77	

leaving a balance of $14,397.99. On July 18, 1936, East paid $1,654.95 in cash upon this account leaving a balance of $12,743.04 due by him to the estate.

Exhibit B, part 1, page 70, shows that Arthur L. East and T. T. East were indebted to Mrs. King prior to 1925 in the amount of $7,440.25. This account was barred by limitation and uncollectible.

15. Special Expense Account

In Paragraph 2 of her will Mrs. King devised two lots in the City of Brownsville, Texas, to the congregation of the Presbyterian Church South of said City of Brownsville, and directed that her Executors should erect a residence for the minister of said congregation upon said lots at a cost not to exceed $5,000. The lots mentioned in the will had been sold by Mrs. King prior to her death, but the Executors paid to T. H. Dennis, Treasurer of said Church, the sum of $6,500 in lieu of said lots, and also paid the $5,000 for the purpose of erecting the residence contemplated by said will (Ex. B, part 2, p. 239).

Mrs. King was buried a few days after her death and prior to the time her Executors qualified as such, in the cemetery in Kingsville, Kleberg County, Texas, contrary 399
to her desire to be buried between her husband and her son in the cemetery in San Antonio, Texas, as expressed in Paragraph 13 of her will.

In Paragraph 4 of her will Mrs. King directed her Executors to improve her cemetery lots in San Antonio, Texas, at an expense not to exceed the sum of $10,000. The Executors, instead of improving said cemetery lots, removed the remains of Capt. Richard King, the husband of Mrs. Henrietta M. King, and of Ella M. Welton and Robert E. Lee King, their daughter and son, from the cemetery in San Antonio and reinterred them beside Mrs. King in Kingsville, Texas.

The Executors paid Mrs. King's funeral expenses in the amount of $1,816.50; the expense of reinterment of Capt. King, Ella M. Welton and Robert E. Lee King was $1,-598.59. The expense of moving the family monument from

San Antonio to Kingsville, and of improving the cemetery lot in Kingsville, was $9,044.00 (M. Ex. 94-a; Ex. B, part 2, p. 238).

16. Donations

During the trust period, the Estate made substantial contributions to charitable, civic and religious institutions in order that community values be developed and maintained and for political purposes in the interest of the Estate. For these purposes during the trust period, the Estate expended the sum of $14,330.00 as "Subscriptions."

The items charged on the books as subscriptions were as follows:

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1. $1,000.00 was paid to Ernest Miller, Trustee, in connection with the Port of Corpus Christi.

2. $1,250.00 was paid Texas Presbyterian Educational Association in connection with a pledge to said association made by Mrs. King during her lifetime.

3. $300.00 was paid as dues to the Corpus Christi Chamber of Commerce.

4. $1,250.00 was paid to Tex-Mex Industrial Institute, a school for Mexican children located at Kingsville, Texas.

5. $4,955.00 was paid to the Tick Eradication Association in connection with the efforts of that association and the Estate to control the fever tick and in connection with litigation in which said association was engaged to enforce the laws with reference to cattle dipping.

6. $250.00 was paid to Rio Grande Valley Association, an organization whose purpose was to advertise and de-

velop the Rio Grande Valley in which the Estate had substantial properties.

7. $600.00 was paid to the League for Equal and Uniform Taxation, an association organized to bring about a more enlightened system of levying **ad valorem** taxes in the State of Texas.

8. $500.00 was paid to Texas Public Relations Committee.

9. $200.00 was paid to the Kleberg County Livestock and Dairy show at Kingsville, Texas, held for the purpose of encouraging the breeding of better beef and dairy cattle.

10. $100.00 was paid to the Association for the Repeal of the Robertson Insurance Law which was desirable to the Estate in that it was believed that the repeal of this law would bring more capital to the State of Texas for investment and produce lower interest rates on money borrowed.

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11. $40.00 was paid the Centennial Committee of the State Fair of Texas at the time said Committee was attempting to promote the Centennial Celebration held in Texas in 1936.

12. $50.00 was paid as a reward for the apprehension of cattle thieves.

13. $5.00 was paid to the Juneteenth Committee in connection with the celebration of Emancipation Day by the colored people of Kingsville.

14. $25.00 was paid to the Inter-Coastal Association in connection with its efforts to bring the canal to the lower coast of Texas.

15. $30.00 was paid to the Texas Cowboy Association.

16. $75.00 was paid to Texas Tax Relief Committee, an organization devoted to the reduction of taxes.

17. $600.00 was paid the New Caller Publishing Company in order to assist that company in publishing a special edition of its paper, the Corpus Christi Caller, to advertise the development of Southwest Texas in which the Estate was one of the principal industries.

18. For political purposes the Estate expended $3,100.00 as follows: (1) On September 8, 1928, $100.00 was paid to John G. Kenedy for the use of the local Democratic Finance Committee. (2) On November 1, 1928, $2,500.00 was paid James G. Gerard, Treasurer Democratic National Committee. (3) In 1932, $500.00 was paid the Democratic National Committee.
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All of these campaign contributions were made in an effort to prevent the election of Herbert Hoover, as President of the United States in 1928, and to secure his defeat in 1932, as the Executors and Trustees believed that his actions as Food Administrator during the World War and his other services to the Government subsequent thereto had resulted in great loss to the cattle industry and that his policies were contrary to the best interests of the Estate.

During the trust period, the estate made similar payments totaling $17,219.30 and charged same as "Donations." Due to a refund of $5.00 the net amount so expended was $17,214.30. The items charged on the books of the Estate as "Donations" were as follows:

1. $1,250.00 was paid Texas Presbyterian Educational

Association on a pledge made by Mrs. King during her lifetime.

2. $2,500.00 was paid to Robert J. Kleberg, Jr., and incorrectly charged to the donation account. This payment was made at the time of the wedding of Robert J. Kleberg, Jr., in response to his demand for additional compensation for his services.

3. $5,000.00 was paid to Richard King, Jr., chairman, to help defray the expense of the public celebration of the opening of the Port of Corpus Christi.

3a. $500.00 was paid Ernest Miller in connection with the Port of Corpus Christi.

4. $20.00 was paid to the Salvation Army for use in its charities.
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5. $271.00 was paid Texas Anti-Tuberculosis League in connection with its sale of Christmas Seals.

6. $150.00 was paid to the Mexican Presbyterian Church at Kingsville, Texas.

7. $100.00 was paid to the Church at Encino, Texas.

8. $1.00 was paid to African Methodist Episcopal Church at Kingsville, Texas.

9. $1.00 was paid to Colored Baptist Church at Kingsville, Texas.

10. $100.00 was paid to the Methodist Building Fund of the Methodist Church at Kingsville, Texas.

11. $75.00 was paid to the building fund of the Manse for the Presbyterian Church at Kingsville, Texas.

12. $50.00 was paid August McKenzie for the Juneteenth Committee in connection with the celebration of Emancipation Day by the colored people of Kingsville, Texas.

13. $355.00 was paid to Union Missionary Society for use in its home for girls.

14. $325.00 was paid to the Bachrach Society for use in its rescue home for girls.

15. $10.00 was paid for the use of the Welfare Society.

16. $25.00 was paid to the Heisig Memorial Home for children.

17. $521.00 was paid in connection with the student
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loan fund and athletic activities at Texas College of Arts and Industries at Kingsville, Texas.

18. $420.00 was paid to American Red Cross.

19. $100.00 was paid to the Community Chest at Kingsville, Texas.

20. $75.00 was paid to the Boy Scouts of America.

21. $10.00 was paid to Kingsville Volunteer Fire Department.

22. $400.00 was paid to the Kleberg County Livestock and Dairy Show.

23. $15.00 was paid to the Empty Stocking Fund at Kingsville, Texas, for the purpose of providing Christmas toys for the poor children of Kingsville, Texas.

24. $250.00 was paid to the Association for the repeal of the Robertson Insurance Law.

25. $300.00 was paid for subscriptions to the Texas Tax Journal, a publication disseminating data on taxes.

26. $300.00 was paid to the Texas Relief Association.

27. $100.00 was paid to Texas League for Equal and Uniform Taxation.

28. $100.00 was paid to Railroad from West Texas Fund, organized for the purpose of promoting additional railroad facilities in the area in which the property of the Estate was located.

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29. $3,729.30 was paid to the National Democratic Committee, the State Democratic Committee, the Democratic Committee of Hidalgo County, Texas, and the campaigns of R. S. Sterling and Clint Small for Governor of Texas.

30. Amounts totaling $156.00 were expended for local charitable purposes in Kingsville, Texas, the nature of which is not disclosed by the record.

I find that the moneys expended by the Estate and charged to Subscriptions and Donations were spent in the interest of the Estate and that none of said payments were made for the advantage of the Executors and Trustees as individuals.

17. Interest Paid by the Trustees

During the trust period the Estate paid interest on its debts amounting to $1,457,482.93 (Line 17 Defendant's Ex.

12).

The highest rate of interest paid was 8% per annum and the lowest rate was 3% per annum, the average rate of interest for the period being 6.08% per annum.

Large amounts of money were borrowed from San Antonio Loan and Trust Company of San Antonio, Texas, but this was due to the fact that this company was willing to make loans to the estate at lower rates of interest than were elsewhere available, and not due to the fact that Leroy G. Denmore, Esq., one of the attorneys for the defendants herein and an attorney for the Estate during much of the trust period, was an executive officer and large stockholder in that company. The financing of the debts of the estate was done by the Executors and Trustees wherever the lowest interest rate could be obtained and

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the interest paid by them was a proper charge against the Estate.

18. Losses in Ranching Operations

At the time of Mrs. King's death she was indebted on notes receivable in the sum of $1,211,174.16, and on accounts payable in the sum of $198,549.66, a total of $1,372,760.82. The liability of her estate on account of Inheritance and Estate Taxes as determined in 1929 was $755,399.63, together with accrued interest thereon of $75,935.07, a total of $831,334.70.

The personal property owned by the estate, other than the cattle owned by the estate, could not have been sold for enough to pay these debts and if the cattle had been sold

for this purpose the estate would necessarily have been forced out of business.

The Executors and Trustees therefore continued the operation of the Estate and refinanced its debts.

The operation of the Estate for the trust period resulted in a net income of $2,079,303.84 (Line 100 Defendant's Ex. 12) which, after making adjustments, amounted to $2,888,154.74 for the purpose of calculating commissions due the trustees (Line 115, Defendant's Ex. 12).

19. Robert J. Kleberg & Company Bank

On the 20th day of April, 1923, Mrs. H. M. King acquired fifty (50) shares of the capital stock of Robert J. Kleberg & Company, an unincorporated association, engaged in the banking business in Kingsville, Texas. This partnership was organized on the first day of September, 1909, under written articles of partnership (Defendant's

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Ex. 41), and such partnership has continued to exist down to the present time.

On November 10, 1934, the affairs of Robert J. Kleberg & Company were examined by representatives of the Federal Reserve Bank at Dallas, and as a result of said examination, a written report of the condition of the said Robert J. Kleberg & Company was made to the Federal Reserve Bank at Dallas and to the partnership (Plaintiff's Ex. 65—Defendant's Ex. 192). As a result of this examination, the Federal Reserve Bank of Dallas required that certain assets of the bank be taken out by the partners and cash be subsituted in lieu thereof.

The items required to be taken out of the bank by the examiners were as follows:

Sundry notes receivable	$233,003.88
Notes of the Kingsville Land & Investment Company, endorsed by Robert J. Kleberg, Caesar Kleberg and Louise E. Flato	138,020.35
Notes of W. M. Doughty (land deal)	67,800.37
Notes of W. M. Doughty (cattle deal)	131,471.72
Depreciation on real estate	8,644.34
Depreciation on stocks and bonds, Ragland Mercantile Co.	47,851.94
Depreciation on interest accrued but not collected	10,328.87
Making a total of	$637,121.48

On November 26, 1934, the King Estate Account in Robert J. Kleberg & Company was charged with the following items.

$138,020.35	to take up the Kingsville Land & Investment Company note.
67,800.37	to take up the W. M. Doughty land note.
131,471.72	to take up the W. M. Doughty cattle note.
$337,292.44	

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On the December 29, 1934, the King Estate Account in Robert J. Kleberg & Company was charged with the following items:

$233,003.88	to take up sundry notes receivable.
47,851.94	depreciation on stocks and bonds, Ragland Mercantile Company.
8,644.35	to take up depreciation on real estate.
10,328.87	to take up depreciation on interest accrued but not collected.
$299,828.04	

On the same date notes receivable totaling $233,003.88, which are listed in Exhibit C, first part, page 34, were assigned to the King Estate without recourse on and subject to all prior liens held by Robert J. Kleberg & Company.

The note of the Kingsville Land & Investment Company in the amount of $138,020.35 was subsequently paid to the King Estate by Caesar Kleberg and by the Estate of Robert J. Kleberg, Sr., by applying the amount thereof to executors' fees, the details of which appear at Paragraph 5 of this report.

The W. M. Doughty land note in the amount of $67,800.37 is further referred to in connection with the W. M. Doughty land deal appearing in Par. 20, of this report, and the W. M. Doughty cattle note in the amount of $131,471.72 is further referred to in connection with the W. M. Doughty cattle deal at Par. 20, of this report.

The remainder of the notes and accounts charged to the 409
King Estate, namely $299,829.04, were charged on the books of the estate as follows:

To notes receivable	$233,003.88
To profit and loss:	
Depreciation on stocks and bonds	47,851.94
Depreciation on real estate	8,644.35
Depreciation on interest accrued but not collected	10,328.87
Total	$299,829.04

All of the notes received by the Estate of Mrs. H. M. King as a result of this transaction were classified by the bank examiners as probable losses and the record does not reflect the amount which can be collected thereon by the King Estate. At the time these losses accrued, the members of the firm of Robert J. Kleberg & Company were as follows:

John D. Finnegan	14/100
R. J. Flato	4/100
C. P. House	12/100
E. W. House	14/100
Hulda Jesse	2/100
Estate of Mrs. H. M. King	10/100
Caesar Kleberg	5/100
R. M. Kleberg	2/100
Estate of Robt. J. Kleberg, Sr.	22/100
R. J. Kleberg, Jr.	2/100
A. T. Perkins	2/100
Claude Pollard	4/100

Marcus Phillips	2/100
S. G. Ragland	5/100
W. H. Young	2/100

In December 1934 most of the members of the partnership were unable to make any contribution toward the losses sustained by the estate. Some recovery, however, could have been had, particularly from Caesar Kleberg, 410
Richard Kleberg and Robert J. Kleberg, Jr. No action was taken by the executors and trustees to secure contributions from the other members of the firm.

However, on June 15, 1936, Mrs. Alice G. K. Kleberg, individually and as executrix of the Estate of Robert J. Kleberg, deceased, paid to Robert J. Kleberg & Company the sum of $100,000.00 to cover additional charge-offs then being made by Robert J. Kleberg & Company (Defendant's Exhibits 71 and 72). This $100,000.00 was applied to certain notes held by Robert J. Kleberg & Company and was not applied to the notes which had been previously assigned to the King Estate. The notes and the amounts applicable to each are listed in Defendants' Exhibit 66.

20. W. M. Doughty Land Deal

Among the lands directed by the Will to be set aside to Richard King and his sisters if on hand at the end of the trust were Los Indios Pasture of 5,027 acres, El Venadito Pasture of 1,774.1 acres and LaComa, two tracts of which, containing 500 and 599.2 acres respectively, are concerned herein, the said tracts aggregating 7,900.3 acres, all a part of the San Salvador del Tule Grant. These traces were separated from the remainder of the San Salvador del Tule lands belonging to her. They had never been

ranched by her, and the defendants did not deem it practicable for the ranch to operate them because they were comparatively poor ranching property and poorly watered and improved, separated from the other lands, very brushy, and at that time infested with Texas fever ticks and adjoined by lands so infested. Walter Doughty of Hidalgo County owned a tract of land of 10,192.5 acres in Hidalgo County adjoining the main body of Mrs. King's lands in the San Salvador del Tule Grant, which had the advantages for ranching purposes which the other lands lacked.

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It was subject to a first lien in favor of H. P. Drought & Company of San Antonio for approximately $42,000, and a school debt owing to the State of Texas. Doughty owed to Mrs. King a note executed to her during her lifetime for $20,000, less a $1,000 payment on account, secured by a second lien on his 10,192.5 acre tract. The Trustees entered into a contract with Doughty whereby they contracted to exchange upon the performance of the following conditions by Doughty the above mentioned Los Indios, El Venadito and the small tracts out of the La Coma, a total of 7,900.3 acres, for Doughty's 10,192.5 acre tract. The contract was an executory contract and provided that before the completion and transfer of titles by deeds Doughty should clear his land of the Drought mortage and should pay an additional sum to the Trustees of $19,000, in addition to the $19,000 balance on the original $20,000 note. To raise these sums Doughty was to subdivide the lands under contract to him by the Estate, colonize and sell them off, and pay the proceeds of such sales towards the liquidation of his contract. In the meantime he was to have possession of the lands contracted to him, of which the Estate was getting no use, and the Estate was to take possession

of his lands, the use of which were valuable to it. The Estate agreed to lend money to Doughty to pay the taxes on the premises in the meantime, and the interest on the Drought mortgage, and also, by verbal separate agreement, agreed to finance him on cattle to stock the pastures he was receiving possession of and nearby pastures operated by him. The contract also provided that in case of postponement past one year in the consummation, no interest was to be charge Doughty (the estate having possession, and use of his premises). In accordance therewith, each party took possession of the respective lands. The Estate, instead of advancing the money direct to Doughty to pay the interest and taxes and for cattle 412
operations, as agreed upon, had the Bank of Robert J. Kleberg & Company make the advances on the King Estate's guarantee of payment. The contract remained in effect for a number of years and Doughty was unable to colonize or sell any of the property or to meet the payments; and shortly before the expiration of the trust the Trustees retained and took back the land which they had contracted to sell to Doughty (except El Venadito 1,774.1 acre tract) and also took the 10,192.5 acre tract which he had contracted to deed to the Estate in exchange, and also took the cattle that he owned, subject to the mortage to H. P. Drought and Company and cancelled all claims against him.

According to the books of the Estate the losses on the land deal were $24,230.30 (line 58 Defendant's Exhibit 12) and on the cattle deal $100,641.72 (line 49 Defendant's Exhibit 12). The actual loss suffered by the Estate in these transactions, however, was much less inasmuch as the Estate had the use of the Doughty land and the cattle

received by the Estate from Doughty were worth much more than the $10.00 per head valuation placed upon them on the books of the Estate. As a part of the transaction, Doughty turned over to the Estate 3,083 head of cattle, valued for bookkeeping purposes as $10.00 per head or $30,830.00. It appears that 2,559 head of these cattle were worth $68,197.89. The record does not show the value of the remaining 524 head, nor does it show the rental value of the 10,192.5 acre tract. It is therefore, impossible to calculate the actual loss suffered by the Estate.

I find that the executors and Trustees entered into their dealings with Doughty and the Bank of Robert J. Kleberg & Company in good faith and in the belief that same would be for the benefit of the Estate. I further find that 413
they allowed Doughty to retain the El Venadito 1,774.1 acre tract in order to avoid litigation.

At the partition of the estate the property involved in this transaction was conveyed to Richard King and his sisters subject to the outstanding indebtedness to H. P. Drought & Company.

21. Kingsville Land and Investment Company.

Kingsville Land and Investment Company was a Texas corporation organized many years prior to Mrs. King's death for the purpose of selling the lands which she had subdivided. The stock in the company was owned by Robert J. Kleberg and Caesar Kleberg. On March 31, 1925 Mrs. King was indebted to this company in the amount of $7,747.28 (Defendant's Exhibit 108—Vol. B, P. 760) which was carried forward on the books of the estate as a credit

in an account styled "Commissions due Agents." The commissions covered by this account were payable only as collected. Cash in the amount of $5,272.53 was paid to the company by the estate and the balance was cancelled by reason of repossession and foreclosure of the properties for the sale of which commissions had been earned (Master's Exhibit 1—Exhibit B, Pt. 1, page 63, et seq.).

I find that this indebtedness was a valid charge against the estate.

The dealings of the estate with this company other than the above are covered in findings relative to R. J. Kleberg & Co. Bankers at Paragraph 19 of this report and Executors' fees at Paragraph 1 of this report.

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22. Kingsville Cotton Mill Company

At the time of her death Mrs. King was the owner of 600 shares of the capital stock, having a par value of $100.00 each in Kingsville Cotton Mill Company, a Texas corporation, organized on April 19, 1921 for the purpose of making cotton yarn. On December 8, 1922, Mrs. King loaned the company $60,000, taking a note for that amount payable three years after date with interest at the rate of 8% per annum, and to secure the payment of same the company executed a deed of trust covering 15.2 acres of land in the city of Kingsville, Kleberg County, Texas, and all improvements thereon including all of the textile machinery owned by it not covered by a purchase contract between H. & B. Machinery Company and Kingsville Cotton Mill Company (Defendant's Exhibit 224).

The company was also indebted to Robert J. Kleberg and Company, Bankers, in the amount of $98,602.66, and

to H. & B. Machinery Company for $40,000.00, the payment of both of which had been guaranteed by Mrs. King, acting through Robert J. Kleberg, her attorney in fact.

The company operated at a large loss until August 30, 1924, at which time it leased its properties to San Antonio Cotton Mills Company, a corporation which operated a cotton mill in San Antonio, Texas. By the terms of this agreement, San Antonio Cotton Mills Company was to operate the mill at its own expense and pay Kingsville Cotton Mills Company one fourth of the net profits resulting therefrom (Plaintiff's Exhibit 192 GG, Defendant's Exhibit 446).

The operation of the mill under this contract was not profitable and the directors of the company decided to
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either deed the property to Mrs. King or to allow her to foreclose her mortage. Notice of this decision was given to the stockholders by the directors on September 21, 1925 (Plaintiff's Exhibit 192 YY).

On October 21, 1925, the estate of Mrs. H. M. King entered into a contract with San Antonio Cotton Mills Company whereby it was agreed that the estate would pay for the purchase and installation of additional machinery at the cost of approximately $50,000.00 and San Antonio Cotton Mills Company would continue to operate the mill, assume all losses resulting from such operations and pay one-fourth of the net profits as rental on the property (Plaintiff's Exhibit 192 Dd, Defendant's Exhibit 265).

Pursuant to this contract additional machinery was purchased by the estate, and installed in the mill during the summer of 1926.

On November 6, 1926, the estate brought suit upon the note for $60,000.00 dated December 8, 1922 and to foreclose the lien given to secure the same (Defendant's Exhibit 235), resulting in the acquisition of the property of the Kingsville Cotton Mill Company at sheriff's sale.

San Antonio Cotton Mill Company operated the mill at a loss for several years, but ceased operations, and surrendered same to the estate.

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The amounts expended during the trust period by the estate on account of Kingsville Cotton Mill are:

Robert J. Kleberg & Co., Bankers	$ 98.602.66
H. & B. Machinery Company	40,000.00
Purchase of new machinery and interest on money owed H. & B. Machinery Company	46,285.91
Taxes and insurance paid on property of Kingsville Cotton Mill Co. prior to foreclosure	2,516.03
	$187,304.60

In December, 1931, by Journal Entry 371 (Defendant's Exhibit 238) the property and machinery were valued at $98,801.94 and charged to "Improved and Unimproved City Property" on the books of the estate. The loss resulting to the estate was therefore $88,502.66.

I find that the executors and trustees entered into the above mentioned contract with San Antonio Cotton Mills in the belief that same would be profitable to the estate and thus recoup the losses suffered by Mrs. King during her lifetime.

23. Kleberg Town & Improvement Company

The Kleberg Town & Improvement Company was organized by Mrs. King at the time the St. Louis, Brownsville & Mexico Railroad was built through her ranch lands. Mrs. King conveyed a large amount of land to this company, and gave the railroad one-half of the stock of the company as an inducement for building the railroad. From the time of its organization down to Mrs. King's death, it
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had sold a great part of its property, but still had on hand a substantial amount of land.

On the 28th day of October, 1918, in addition to the conveyance of the Santa Gertrudis 30,000-acre tract and the Palo Alto Farms, elsewhere referred to herein, Mrs. Kleberg assigned all her interest in the Kleberg Town & Improvement Company to her daughter, Alice G. K. Kleberg (Defendant's Ex. No. 11).

The business of the Kleberg Town & Improvement Company was handled by Mr. Finnegan and Mr. Fromme (they being also employees of the Estate) and each was paid a small salary for their services. The offices of the Company were maintained in the offices of the King Estate. The King Estate paid all of the rent and telephone expenses for the office and telephones used by it, and the Kleberg Town & Improvement Company. The evidence shows that only a small amount of business was transacted for the Company as compared to the business of the King Estate, and the evidence further shows that the Kleberg Town & Improvement Company had no business which necessitated long distance telephone calls. I therefore find that the expense of the trustees for rent and telephone services were not

increased by reason of the use of the facilities provided by the Estate for Kleberg Town & Improvement Company.

On June 30, 1934, the Executors and Trustees of the King Estate purchased from Kingsville Town & Improvement Co. a house and lot in the City of Kingsville, paying therefor a total consideration of $2,561.21, of which $1,162.35 was paid in cash and the balance of $1,398.77, represented by the assumption of a deed of trust lien held by Kingsville Building & Loan Association. This house was purchased by the trustees in order to secure the services of 418
Hart Mussey, a bookkeeper whose services were required by the business of the Estate. Mussey lived in Hebronville, Texas, was well acquainted with the type of business conducted by the trustees and was the best man available for the position. He refused to accept employment with the King Estate unless they furnished him with living quarters in addition to his salary. In order to make these quarters available this house was purchased, and the use of same was furnished to Mussey without charge. This arrangement began in July, 1934, and continued without interruption through August, 1939, even though Mussey's employment by the trustees from April 1, 1935, to August, 1939, was that of keeping the books set up by the trustees for the benefit of the plaintiff's herein.

For many years prior to Mrs. King's death, and for the entire period of the trust, there was a running account on the books in the name of the Kleberg Town & Improvement Company. At the time of Mrs. King's death the company was indebted to her Estate in the amount of $1,340.77. Various debits and credits appear in conection with this account as shown by Master's Exhibit 16 and same are ana-

lyzed in Master's Exhibit 104, which exhibit shows that for a substantial portion of the period of the trust the Estate was indebted to Kleberg Town & Improvement Company in substantial amounts. At the end of the trust Kleberg Town & Improvement Company was indebted to the Estate in the amount of $105.15, which amount was paid on July 17, 1936.

I find that no loss resulted to the estate by reason of its dealings with this Company.

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24. Kingsville Publishing Company

Kingsville Publishing Company was a corporation engaged in the printing business and publishing a weekly newspaper in the city of Kingsville. Its stock was owned by Robert J. Kleberg, John D. Finnegan, E. W. House and E. B. Erard.

In 1924 it rented a building from Mrs. King in which to operate its business at a rental of $50.00 per month. At the time of Mrs. King's death $50.00 was due her for the previous month's rent and same was promptly paid to her estate.

In 1927, the Estate improved the property as a cost of $6,118.00 and the rent was increased to $100.00 per month through the year 1931. During the years 1932 and 1933 the rent was reduced to $75.00 per month. In 1934 the rent was reduced to $68.75 per month and in 1935 the rent was raised to $75.00 per month. All of the rent was paid as it came due.

Kingsville Publishing Company had no other dealing

with the Estate except for small amounts of job printing for which it charged current prices.

25. Ragland Mercantile Company

Ragland Mercantile Company was a Texas Corporation operating a retail department store in the City of Kingsville, Texas. Its stock was originally owned by Robert J. Kleberg, Robert J. Kleberg, Jr., Richard M. Kleberg, Caesar Kleberg, Charles Flato, Jr., Austin Rhew and Mrs. H. M. King.

In 1925 the company was indebted to the Robert J. Kle-
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berg & Company Bank in the amount of $115,000.00 and to the estate of Will Ragland in the amount of $10,000.00 and was insolvent. In July, 1925, the stockholders transferred all of the capital stock of the company to the Robert J. Kleberg & Company Bank which thereafter operated the business.

The note representing the debt to the estate of Will Ragland was endorsed by Mrs. H. M. King, R. J. Kleberg, Caesar Kleberg, Sam Ragland and Charles Flato, Jr. On August 3, 1925, each of the endorsers paid off his part of the obligation.

I find that the stock in the company owned by Mrs. King was without value and that the $2,000.00 which her estate paid on her endorsement on the $10,000.00 note was uncollectible.

26. Gulf Coast Gin Company

At the time of her death Mrs. King held the note of Gulf Coast Gin Company for $10,000.00, dated November 4,

1916, due five years from date with interest at the rate of 8 per cent per annum on which there was a balance due of $6,832.33. Mrs. King owned all the capital stock of the company except for the qualifying shares of the directors, and it was in the process of liquidation at the time of her death.

On October 4, 1929, J. S. Butler who had purchased some of the assets of the company paid $750.00 in cash to the estate and same was applied on the note leaving a balance of $6,082.23 which was in fact uncollectible and was charged off as such on November 30, 1934.

At the time of her death Gulf Coast Gin Company owed Mrs. King $9,665.93, an open account, which was in fact

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barred by limitation and uncollectible at the time of her death. This account was therefore not set up as an asset on the books of the estate. The assets of the Gulf Coast Gin Company had been sold principally to Kingsville Cotton Oil Mill Company which had assumed the debt to Mrs. King and which was also indebted to Mrs. King, and was in process of liquidation long prior to her death.

The estate realized $9,912.08 from the assets of Gulf Coast Gin Company and recorded same as a credit balance in the account receivable in the name of Gulf Coast Gin Company. This credit balance was applied in part payment of the indebtedness of Kingsville Cotton Oil Mill Company.

I find that no loss resulted to the estate by reason of this transaction.

27. Sal del Rey Cattle, Land & Salt Co.

The Sal del Rey Cattle, Land & Salt Co. is a Texas corporation which owned approximately 7,264.4 acres of land in Hidalgo County on which there is located a large salt lake from which salt is taken from time to time for use in the care of cattle.

The capital stock of this company consisted of 200 shares owned as follows.

H. A. Coffee	50 shares
Robert J. Kleberg, Trustee for Mrs. H. M. King	50 shares
Robert J. Kleberg, Trustee for James B. Wells	50 shares
Robert J. Kleberg, individually	47 shares
Caesar Kleberg	1 share
Robert J. Kleberg, Jr.	1 share
Richard M. Kleberg	1 share

The officers of the company were Robert J. Kleberg, President; Caesar Kleberg, Vice President; and John D. Finnegan, Secretary-Treasurer.
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At the time of Mrs. King's death the company was indebted to Mrs. King on open account in the amount of $2,241.82, and during the trust period the Estate advanced the additional sum of $11,721.23, and the corporation paid to the Estate during the trust period the sum of $1,613.55 represented by salt purchased by the Estate.

On March 31, 1935, there was a balance owing the Estate of $12,349.60.

All of the money advanced by Mrs. King, and by her estate to this company was used for the purpose of paying taxes and other expense incident to the ownership of said

land by the corporation. The assets of the corporation were at all times worth more than the debts owing Mrs. King and her estate. At the end of the trust the stock of this company owned by the Estate was partitioned.

28. Legal Expenses

I find that the legal expenses listed in the Audits and the Statement of Receipts and Disbursements (Exhibits B, C, and D.) and also shown in the profit and loss statement (Line 14—Defendant's Ex. 12) amounting to $256,-451.26 were proper charges against the estate.

29. Salaries Other Than Ranch Labor

J. K. Wells, Edward R. Kleberg and I. L. Gill were attorneys employed by the estate to handle certain of its legal business. The items listed in Paragraph 29 of Plaintiff's Bill of Particulars as having been paid to them represents the payment of retainers, which I find to be reasonable and therefore proper charges against the estate.

H. B. Johnson, F. E. Goodwin and T. R. Tate were emloyees of the ranch and the amounts listed in Paragraph 423
29 of Plaintiff's Bill of Particulars as having been paid to them, were for salaries due by the estate and were proper and reasonable charges against the estate. The payment of $1,800.00 to Mrs. J. B. Wright, listed in Paragraph 29 of Plaintiff's Bill of Particulars, was a pension paid to the widow of an old employee of Mrs. King and of her estate, paid to her for a short period after the death of her husband.

30. Richard King, Sr.

Richard King, Sr., the son of Mrs. Henrietta King and

the father of Richard King, Jr., Mrs. Minerva King Patch and Mrs. Mary King Estill, died on September 27, 1922. In his will be devised all of his property to his widow, Mrs. Elizabeth Pearl Ashbrook King.

At the time of his death his principal estate was the La Puerta Ranch near Agua Dulce in Nueces County, Texas, containing 13,904 acres of land, more or less.

At the time of his death he was indebted to Mrs. King on Notes Receivable aggregating $21,000, and on open account in the sum of $255,209.33, exclusive of interset. He was also indebted to persons other than Mrs. King in the sum of $367,457.69, of which $161,040.01 was secured by liens on substantially all of his real property except 200 acres of the La Puerta Ranch claimed by him as a homestead.

Mrs. Elizabeth Pearl Ashbrook King died in 1926, devising all of her property to Richard King and his sisters.

Richard King, Jr., qualified as Executor of his Mother's estate and since her death has managed the property for the benefit of himself and his sisters.

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The debts of Richard King to persons other than Mrs. Henrietta King were never paid in full, but were refunded from time to time, and the total assets of said estate were never sufficient to pay the claims of his creditors as the total value of the real estate prior to March 31, 1935, owned by Richard King, exclusive of his homestead, was never greater than the amount of secured debts.

On several occasions during the trust period Richard King, acting on behalf of himself and his sisters, offered

to convey to the Estate all of the assets of the estate of Richard King, deceased, in cancellation of the indebtedness to the Estate, provided the Estate of Mrs. Henrietta M. King would promise and agree to pay all of the outstanding obligations of the estate of Richard King, Sr. This, however, the Executors and Trustees of the Estate refused to do, as they were of the opinion that the value of the properties belonging to the Estate of Richard King were less than the outstanding debts and that no benefit would accrue to the Estate of Mrs. Henrietta King by such a transaction.

I find that this action on behalf of the Executors and Trustees was in accordance with sound business judgment, and to the interest of the Estate.

At the time of the partition of the properties, notes aggregating $21,000 executed by Richard King, Sr., together with interest thereon, were charged to the heirs of Richard King.

31. King Ranch

The item of $311.00 paid by the estate to King Ranch was paid to it as successor in title to Mrs. Alice G. K. Kleberg as one of items in the partition deed (Defendant's Ex. 122, Item VI).

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32. John I. Kleiber

At the time of Mrs. King's death her property in the San Salvador del Tule Grant in Hidalgo and Kenedy Counties, Texas, was involved in a suit to partition said Grant. John I Kleiber was the Master in Chancery in this suit.

Prior to her death expenses amounting to $20,817.05 had been incurred in this litigation and paid by her. In order to keep a record of these expenditures same were charged on her accounts receivable to John I. Kleiber, Master in Chancery. Subsequent to her death, the estate paid the additional sum of $27,180.39 as expense in this case and recorded same on the books of the Estate in the name of John I. Kleiber, Master in Chancery. Upon conclusion of the litigation in 1931 the expense was charged to the land account and credited to the account of John I. Kleiber, Master in Chancery.

These entries in no sense represented advances to Kleiber and were proper charges against the Estate.

On September 28, 1934, Kleiber borrowed $250.00 from the Estate and executed his note therefor, payable one year from date with interest at the rate of 7 per cent per annum. At partition, this note was set aside to King Ranch and the heirs of Richard King.

33. Stocks and Bonds

The Estate purchased twenty shares of the capital stock of Rincon Improvement Company from H. B. Baldwin on October 11, 1927, as part of the liquidation of Rincon Improvement Company. (See Paragraph 34 hereof.)

The estate purchased twenty-two shares of the capital stock of Raymondville National Bank of Raymondville,
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Texas, at the time of its organization for $2,200.00. The stock was purchased as an investment through Caesar Kleberg who was acting on behalf of the Estate. A portion

of the purchase price was paid by him from his own funds and credited to his account on the books of the Estate.

This stock was sold to I. B. Loe for $1,200.00 on December 30, 1929 (Master Ex. 119).

The Estate purchased 25 shares of the capital stock of the Corpus Christi Trust Company on September 6, 1928, for $2,750.00 from E. J. Miller. This stock was purchased as an investment. On October 26, 1929, the stock was sold to B. F. Dittmar & Company for $3,250.00 (Master's Ex. 118).

The Estate purchased six shares of the capital stock of Dairy Products Company on March 27, 1931, from W. H. Beck for $450.00. This purchase was made as an invesment.

The estate purchased 550 shares of the 8 per cent preferred stock of National Finance Credit Corporation for $55,000.00. The purchase of the stock was necessary in order to finance the cattle loans made through that company with Federal Intermediate Credit Bank.

The Estate acquired shares of stock in Federal Land Bank of Houston of the value of $92.50 in connection with the acquisition of the Barrera lands upon which the Federal Land Bank had made a loan. (See Paragraph 38 hereof.)

In September, 1930, the Estate purchased Road Bonds of Kleberg County to the value of $150,000.00. These 427
bonds were purchased as an investment and also, since the Estate was the principal property owner and tax payer

in the county, to insure the sale of the bonds at par. The bonds were subsequently sold by the Estate at par to Corpus Christi National Bank and San Antonio Loan & Trust Company. At the termination of the trust, the property of the Estate was partitioned subject to any liability which might accrue to the Estate on the repurchase agreements. Subsequently the bonds were sold by the above mentioned banks and the Estate was released from the repurchase agreements.

34. Rincon Improvement Company

The Rincon Improvement Company was organized many years before Mrs. King's death for the purpose of subdividing and selling land owned by it on the bay shore near Corpus Christi in Nueces County, Texas. The storm of 1919 destroyed the books and records of the Company and washed away most of its properties.

At the time of Mrs. King's death she owned 1803 shares of the capital stock of the company which the executors and trustees considered to be worthless.

During Mrs. King's lifetime she made loans to the company totaling $153,577.53 on which there was a balance due of $73,860.86 at the time of her death. The executors and trustees considered this indebtedness to be worth $1,287.50 as the security held by them covered 103 lots which they valued at $12.50 each. The Inheritance Tax Authorities increased the value of this indebtedness to $30,000.00 in the final valuation of the estate.

Rincon Improvement Company also owed Mrs. King $6,606.49 on open account which was worthless and barred by limitation at the time of her death.

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Subsequent to Mrs. King's death, the Port of Corpus Christi was opened by the United States Government pursuant to the efforts of the citizens and business interests in that territory (including the efforts of the King Estate which made financial contributions to the effort—as had Mrs. King during her lifetime) and the properties owned by Rincon Improvement Company together with certain properties belonging to the Estate greatly increased in value.

In April, 1926, the Estate sold most of the property it owned to W. E. Pope for $88,225.00, of which $20,000.00 was paid in cash and the balance was represented by vendor lien notes aggregating $68,225.00. These notes were ultimately collected in cash through Guaranty Title Company of Corpus Christi, Texas, the net receipts after deduction of commission and expense being $80,661.04.

In order to assist Rincon Improvement Company in making a sale of most of its properties to W. E. Pope, Guaranty Title Company, upon instructions of the executors and trustees, advanced $3,172.72 toward the expense of the sale. This sum was repaid by Rincon Improvement Company in cash on March 14, 1927.

In April, 1926, Rincon Improvement Company sold the most of its properties to W. E. Pope for $123,465.00 through Guaranty Title Company which after deducting commissions and expenses remitted $8,500.00 to the Estate on January 1st, 1927, and $103,703.78 on March 26, 1928. Inasmuch as the Estate was not the only stockholder in the company it did not credit these receipts to liquidating dividends when received, but kept same as an account pay-

able to see whether any of the other stockholders made any claim against the funds. In order to be entitled to keep 429
as much of this money as possible, the executors and trustees purchased twenty shares of stock in Rincon Improvement Company as described in Paragraph 33 hereof.

In December, 1934, no claims having been asserted by the other stockholders, the balance in the account of $103,686.70 was credited to liquidating dividends.

35. Life Insurance Purchased by the Trustees.

In February of 1933 the Estate purchased policies of life insurance payable to the Estate on the life of Robert J. Kleberg, Jr., aggregating $775,000, at an annual premium of $16,688.50. These policies continued in force during the trust period, and after application of dividends earned by the policies to the premiums, the net cost of same to the Estate was $43,867.50. At the end of the trust the King Ranch Corporation, successor in title to Mrs. A. G. K. Kleberg, purchased these policies of insurance, refunding to the Estate on March 28, 1935, the sum of $14,185.50, making the net cost of the protection afforded the Estate for the period from February, 1933 to March 31, 1935, of $29,682.00.

I find that these policies of insurance were purchased in the exercise of sound business judgment for the benefit of the Estate, and for the protection of its creditors.

36. F. Fromme

F. Fromme was employed by Mrs. King as one of her principal bookkeepers for many years prior to her death,

and was an employee of the Estate for the entire period of the trust. He acted as chief clerk in the office of the Estate, handling receipts and disbursements, preparation of checks, making income and inheritance tax returns, and performing many valuable services for the Estate. After
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the illness of John D. Finnegan in November of 1933, Fromme did much of the office work formerly done by Finnegan in addition to his other duties. His cash salary varied from time to time, totaling $25,302.25 for the entire trust period, an average of $210.85 per month.

At the time of Mrs. King's death he was indebted to her on open account in the amount of $1,291.34. Additional sums were advanced to Fromme so that in December, 1929, he owed the Estate $1,373.86.

At the time of Mrs. King's death, Fromme owed her notes aggregating $4,091.04. Additional sums were borrowed from the Estate on notes so that the total amount owed by Fromme to the Estate in December, 1929, on notes receivable was $5,704.69.

In December, 1929, the Executors and Trustees charged off the Fromme notes and account as extra compensation for his services to the Estate in preparing the Estate Tax Returns and the data used in connection therewith. The total compensation paid Fromme for the trust period, including the cash salary and extra compensation, was $32,380.80, an average of $269.84 a month.

I find that the compensation paid Fromme was reasonable.

On December 21, 1933, Fromme borrowed $1,500.00 from the Estate and executed his note therefor payable on demand with interest at the rate of 6 per cent per annum. On September 18, 1934, Fromme borrowed $120.24 from the Estate and executed his note therefor payable one year from date with interest at the rate of 7 per cent per annum.

No principal or interest was paid on these notes and same were set aside to King Ranch and the heirs of Richard King at the partition of the Estate.

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Subsequent to December, 1929, the Estate advanced to Fromme on open account the sum of $1,497.60 which was still owing at the end of the trust and was uncollected on July 14, 1939.

36B. Roy Miller

In 1913 Roy Miller, a brother-in-law of Richard King, Jr., contracted with the Angelina Cattle Company of Victoria, Texas, for the purchase of 20,000 acres of land in San Patricio County, Texas, afterwards known as the Cubage and Miller subdivision. Being unable to meet the payments called for in this agreement, Miller entered into a contract with Mrs. King whereby she purchased 6,000 acres of this land and agreed that Miller was to sell the property, pay Mrs. King $22.00 per acre for the land sold with interest at the rate of 7 per cent per annum from the date of the purchase by Mrs. King and retain the difference between this amount and the sales price as a commission to be paid by Mrs. King from time to time when the lands were fully paid for.

At the time of Mrs. King's death there was due Miller under this contract the sum of $12,514.95, which amount was carried forward on the books of the Estate as an account payable. During the trust period additional commissions became due under the contract amounting to $2,-315.01, a total of $14,829.96.

The Estate debited this account with cash paid to Miller and with an adjustment of the commissions due him because of a shortage of acreage in one of the tracts sold and a consequent decrease in the purchase price amounting to $136.26, the total debits in the account being $29,-854.96, leaving a balance due the estate of $15,025.00.

This balance was paid on September 31, 1928, by the application of moneys due Miller by reason of his services
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to the Estate in connection with the Estate Tax, said payment being charged to legal expense on the books.

Roy Miller was employed by the Estate to assist with the Federal Estate Tax. He spent much of his time in Washington from the beginning of the trust through the year 1928, appearing before Congressional Committees and the Estate Tax Authorities. As a result of his activities in connection with the efforts of the Executors and Trustees and other persons employed by them, the Revenue Act of 1926 was made retroactive to 1924 and the Estate Taxes were very materially reduced.

I find that the amount paid Roy Miller for his services in connection with the Estate Tax matters and charged to legal expense were a proper charge against the estate.

Roy Miller was also the Chief Executive Officer of the Intra-Coastal Canal Association and other organizations having to do with bringing deep water transportation facilities to Corpus Christi and the Mexican border. The Estate was the owner of large amounts of land along the Laguna Madre through which the Intracoastal Canal was to pass and its interests were affected by the opening and maintenance of the Port of Corpus Christi and the extension of the Intracoastal Canal.

In order to assist in the promotion of these projects, the Estate made substantial contributions to the organizations sponsoring same and in addition paid to Roy Miller a salary which for the trust period totaled $26,612.25 (Exhibit B, Part 2, page 182; Exhibit C, Part 2, page 144).

On November 3, 1933, the Estate paid $230.00 to Lyndon Johnson for the account of Roy Miller; this item
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was charged to and paid by the estate of Robert J. Kleberg and the Estate suffered no loss by reason thereof.

Roy Miller was an executive officer and stockholder of the New Caller Publishing Company which published a daily newspaper in Corpus Christi, Texas. At the time of Mrs. King's death, she owned 330 shares of the Capital Stock of this company, valued on her books at $50.00 per share.

On November 30, 1926, Roy Miller purchased 200 shares of this stock from the Estate for $60.00 per share and in payment thereof executed his note in the amount of $12,000, payable five years from date with interest at

the rate of 5 per cent per annum. This note and the interest due thereon was paid in cash on November 1st, 1939.

On November 1, 1929, Roy Miller purchased the remaining 130 shares of this stock from the Estate for $25,000.00 cash.

I find that these sales were made in good faith and for a fair price.

37. Guaranty Title Company

Guaranty Title Company is the principal abstract and title guaranty company located in Corpus Christi, Texas. It handles numerous matters for the Estate in the preparation of abstracts, investigating titles, and guaranteeing same, and the collection of notes placed in its hands by the Estate. These notes were principally those arising from the sale of property to W. E. Pope as described in Paragraph 34 hereof. At no time did the estate advance funds to this company. As collections were made on the notes placed in its hands for collection, the company remitted

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the proceeds thereof to the Estate after deducting the usual and customary fees.

I find that Guaranty Title Company is not indebted to the Estate and that the fees charged by it for its services were proper charges against the Estate.

38. Lands purchased by the Trustees

During the trust period the Estate purchased various tracts of land, all of which are listed in Exhibit B, Part 1,

pp. 135 to 138, inclusive, and Exhibit C, Part 1, pp. 101 to 115. From these exhibits it appears that land valued at $1,341,726.52 was acquired by the Estate during the trust period. Included in these figures, however are not only the additions to the values of lands made by the Federal Estate Tax authorities, but land acquired by the Estate in cancellation of vendor lien notes held by it, secured by the lands, together with certain sums of money spent by the Estate for the establishment of its titles. With reference to the items listed in Paragraph 38 of Plaintiff's Bill of Particulars, the facts are as follows.

D. Sullivan of San Antonio, Texas, claimed an interest in a tract of land belonging to the Estate. Upon the advice of its attorneys on December 31, 1926, the Estate paid Sullivan $3,525.00 for a quit claim deed to the property rather than litigate the title. I find this item was a proper charge against the estate.

On September 20, 1927, the estate puchased 28 lots in the Brooklyn and Rincon Additions in Corpus Christi, Texas, at Sheriff's sale. This was done to protect its title to the property and was a proper charge against the Estate.

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On April 3, 1929, the Estate purchased 8.44 acres of land from Charles H. Flato for $422.00; and on the same date it purchased 3.6 acres of land from Mrs. Mamie Flato for $200.00.

On April 26, 1929, the Estate purchased 13.58 acres of land from J. P. Olsen for $400.00.

All three of the above mentioned tracts adjoined the

Estate properties at the Caesar Pens, a principal shipping point for the Laureles and Santa Gertrudis Ranches, and such purchases were necessary and convenient for the economical management of the ranch.

On December 30, 1930, the Estate paid Seaburg, George & Taylor, attorneys at Brownsville, Texas, the sum of $10,000.00 in connection with the litigation involving title to the San Salvador del Tule Grant in Hidalgo County, described in Paragraph 32 hereof. I find this item to be a proper charge against the Estate.

On June 12, 1931, the Estate paid the Ellis Heirs $15,000.00 in settlement of the litigation involving the lands in Bee and Goliad Counties purchased for Mrs. King by Robert J. Kleberg, Trustee. I find this item a proper charge against the Estate.

The Hughes transaction amounting to $16,539.03 arose by reason of the cancellation of the notes of M. M. Hughes and the reacquisition of the property sold M. M. Hughes by Mrs. King. I find this item a proper charge against the Estate.

On October 31, 1931, the Estate purchased 198.98 acres of land for $9,910.00 from the B. F. Yoakum Estate. 436

This tract of land lay between the Santa Gertrudis Ranch properties belonging to the Estate and the new highway being built by the State Highway Department through the Santa Gertrudis Ranch. It was necessary to purchase this property to prevent the ranch being cut off from the highway at this point.

On October 31, 1931, the Estate purchased 1795.2 acres from the Correa family for $46,368.66. This tract of land lay in the San Juan de Carricitos Grant in Willacy County and was totally surrounded by property belonging to the Estate especifically devised to the Atwoods and Mrs. Page in Mrs. King's will. The purchase was advantageous to the Estate in that the outstanding ownership of property within the boundaries of the Estate lands made it difficult for the Estate to control the use of the lands and to keep the lands from being reinfested with the fever tick. The original deeds from the Correa family were taken in the name of James K. Wells, Trustee, he being one of the attorneys for the Estate. The property was then transferred by James K. Wells, Trustee, to Robert J. Kleberg, Trustee, and by him conveyed to the Estate of Mrs. H. M. King. The transaction was handled through trustees as a matter of convenience to the Estate, and neither James K. Wells nor Robert J. Kleberg, Jr., received any personal profit.

The Kleiber item of $27,180.59 is referred to in Paragraph 32 hereof and I find same to be a proper charge against the Estate.

The item of $88.05 was expense incurred in the reacquisition of property sold to Pencie E. Skipper in cancellation of her note and was a proper charge against the Estate. 437

On October 8, 1932, the Estate purchased 640 acres of land in Starr County, Texas, from Alma J. Dahl for $3,-492.72, and on July 31, 1933, the Estate purchased 1440 acres in Jim Hogg County from Albino Barrera for $8,-172.49, of which $3,317.15 represented cash paid to the

owners, $314.00 represented unpaid taxes for prior years by the Estate, and $880.00 represented consideration paid for certain houses referred to in the contract of sale but not mentioned in the deeds, and the balance of $3,661.34 was represented by the assumption of a Federal Land Bank indebtedness together with Federal Land Bank stock in the amount of $92.50. Both of the above mentioned tracts of land adjoined the San Antonio Viejo Ranch belonging to the Estate and the purchase of same was advantageous to the Estate.

39. Joe Keepers, Jr.

In order to protect its properties from reinfestation with ticks, the Estate leased certain properties known as the Paso Ancho Pasture and Donna Pasture which adjoins the Santa Gertrudis Ranch on the north and lay between the pasture lands belonging to the Estate and lands belonging to other parties on which cattle were being run which were known to be "ticky." The Estate did not place its own cattle upon these pastures for fear of reinfestation, but leased these pastures to Joe Keepers, Jr., from time to time during the trust period at the same rental which the Estate was paying. Keepers was a tick inspector for Kleberg County and an experienced cattle man, and the Trustees felt that the use of the land by him would be a protection to the properties of the Estate. All the rentals due the Estate by Keepers were promtly paid by him in cash except for the year 1926 on the Donna Pasture and the Ella Ranch in the amount of $3,529.26, which amounts were charged to Keepers on open account.
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At the time of Mrs. King's death Keepers was indebted to her in the amount of $100. Additional items were

debited to his account, consisting primarily of cattle sales but included the rental item of $3,529.26. Payments were made on this account in due course of business totaling $8,160.53, all of these payments being in cash except for small items of commissions due Keepers for cattle sold by him for the account of the Estate and for cattle valued at $3,951.80 which were sold by Keepers and the receipts of the sale paid to the Estate.

On March 31, 1935, Keepers was indebted to the Estate in the amount of $279.68.

On January 1, 1927, Keepers purchased 167 cows from the Estate and executed his note in the amount of $6,580.00 in payments for same. This note was paid with interest on May 9, 1927.

On December 3, 1924, Joe Keepers, Jr., and Harry McCullum purchased certain real estate from Mrs. H. M. King and as part of the consideration therefor executed their vendor's lien note in the principal sum of $9,000, payable in installments of $900 each, with interest at the rate of 6 per cent per annum, the first installment being due on December 31, 1925, and a like installment becoming due annually thereafter. No interest or principal was paid upon this note during the trust period and same was set aside to Mrs. Alice G. K. Kleberg as being specifically bequeathed to her at the time of the partition.

On October 3, 1934, the Estate loaned Keepers $200 taking his note due April 3, 1935, with interest at the rate of 7 per cent. This note was partitioned to King Ranch and to Richard King and his sisters.

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40. Ranch Employees

1. J. B. Wright was an employee of Mrs. King for many years prior to her death as storekeeper at the Santa Gertrudis Ranch and continued in said capacity until the time of his death in 1927.

On December 1, 1918, he borrowed $500.00 from Mrs. King on his unsecured note payable June 5, 1919, with interest at 8%. At the time of her death no principal or interest had been paid on this note and same was barred by limitation.

In September, 1925, the estate advanced Wright $230.00 on open account which was charged off as uncollectible on December 31, 1927. After Wright's death it was discovered that his store accounts were short in the amount of $7,499.88. This amount was also charged off as uncollectible on December 31, 1927.

I find that J. B. Wright was insolvent at the time of his death.

2. Epp Goodwin was an employee of the estate, being foreman of the Norias Ranch throughout the trust period. During Mrs. King's lifetime he had an account on her books to which was debited money and supplies advanced him and to which were credited amounts due him as salary. At the time of her death the debit balance in the account was $356.26. The account was maintained during the trust period, the balance therein being sometimes in favor of the estate and at other times in favor of Goodwin. At the end of the trust period the debit balance in the account was $302.70 and was one of the items reserved by the trustees at partition.

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On October 30, 1927, the estate advanced Goodwin $1150.00 and took his note for that amount payable one year from date with interest at 8% per annum.

On June 10, 1929, the estate advanced Goodwin the sum of $500.00 payable six months from date with interest at the rate of 8% per annum.

No payments were made either of principal or interest on these notes and same were set aside to the King Ranch and to Richard King and his sisters at partition.

3. Tom Tate was an employee of the estate being foreman of a part of the Norias Ranch throughout the trust. During Mrs. King's lifetime he had an account on her books to which was debited money and supplies advanced to him and to which was credited amounts due him as salary. At the time of her death there was a debit balance in the account of $105.00. The account was maintained during the trust period, the balance being sometimes in favor of the estate and at other times in favor of Tate. At the end of the trust period the credit balance was $100.00 and same was a liability of the estate.

During the trust period Tate borrowed money from the estate and executed his notes therefor as follows:

Date	Maturity	Interest	Amount
2/18/28	2/18/29	7	$300.00
6/ 3/29	6/ 3/30	8	300.00
10/ 8/29	10/ 8/30	8	700.00
2/ 8/30	2/ 8/31	8	500.00
3/ 5/30	3/ 5/31	8	200.00
6/21/30	12/31/30	8	200.00
10/ 5/32	10/ 5/33	8	200.00
10/10/33	10/10/34	7	100.00
	Total		$2,500.00

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No interest was ever paid on these notes as it was not customary for the estate to collect interest from the loans it made to its employees. The above notes were paid by the application of credit balances in the account receivable on June 30, 1934.

Thereafter Tate borrowed money from the estate and executed his notes therefor as follows:

Date	Maturity	Interest	Amount
9/14/34	9/14/35	7%	$ 100.00
10/ 6/34	10/ 6/35	7%	$1000.00
10/30/34	10/30/35	7%	$ 50.00
	Total		$1,150.00

No principal or interest was collected on these notes during the trust period and at partition same were set aside to King Ranch and to Richard King and his sisters.

4. J. C. Gonzales and S. Casares were old employees of Mrs. King and of her estate to whom were advanced $1,322.17 and $790.50 respectively in excess of their wages during the period from April 1, 1925, to December 31, 1927. The items are included in the total of $23,593.12 of payroll advances charged off as uncollectible during the trust period (Plaintiff's Ex. 134—Defendant's Ex. 82).

During the trust period the wages paid the several hundred employees, many of whom were born on the ranch, were very small and were insufficient to provide for the employees and their families in case of sickness, funeral expenses and other emergencies. It was customary for Mrs. King to advance funds for these emergencies and to make small deductions from the pay of the employees to

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reimburse herself. The result of this policy was that the ranch never had any labor trouble with its employees.

This custom was continued by the trustees resulting in the loss above stated which amounted to 1¼% of the total payroll which was approximately $1,332,666.46 during the trust period.

I further find that the total cash wages paid the ranch employees plus the housing, rations, clothing and medical attention furnished them together with the payroll advances made to them and charged off were not in excess of a reasonable compensation for the services rendered by them.

41. W. T. Moseley

W. T. Moseley was sheriff of Kleberg County, Texas, for a number of years during the trust. He purchased various items from the estate, largely tires and tubes for his automobiles. The total debits to this account during the trust period were $700.78. The total credits to his account were $636.34 leaving an unpaid balance of $66.44 at the end of the trust. All of the credits to this account were in cash except for $191.29 which was charged to general ranch expense. The charge of $191.29 represents tires and tubes purchased by Moseley from the Ranch between December 31, 1928 and December 16, 1929, and the credit was entered in payment of services rendered the ranch (Ex. B., part 2, page 183— M. Ex. 150).

I find this item a proper charge against the estate.

42. Traveling Expenses

Numerous advances were made by the Estate as traveling expenses of persons employed by the Estate other
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than the Trustees, all of such expenses being detailed in

Ex. B, C, and D. I find these items to be proper charges against the estate.

43. Miscellaneous Ranch Expense

I find that during the trust period the estate expended $71,163.33 upon items of general expense which were not chargeable to any particular division of the ranch. These expenses were incurred for the benefit of the Estate and were proper charges against it.

44. Store and Warehouse Operations.

Mrs. King prior to her death, and her estate during the trust period, maintained commissaries or stores on the principal ranches operated by the Estate in order to issue supplies and materials as used upon the several ranches and for the purpose of issuing rations to the employees as a part of their compensation. In addition, small stocks of merchandise were maintained for the convenience of the employees as the ranch headquarters were located many miles from public stores. No attempt was made to make a profit upon items sold ranch employees, and the sale prices were based upon actual cost of the material delivered at the stores. Each of the stores was in charge of a storekeeper who issued supplies and rations upon the requisition of the foreman. Reports were made of the amounts issued to the main office at Kingsville, where they were charged to Repairs, Improvements, or other operations as indicated by the requisitions. At the beginning of the trust there were rations and supplies on hand of the value of $7,481.97. As purchases were made, same were charged to the stores, and as supplies were issued same were credited to the stores. At the end of each year a phy-

sical inventory of the items on hand was taken at a dollar figure, the value being based upon the cost of the 444
articles as of the time the inventory was taken. Adequate control of the items charged to and issued by the stores were maintained. These operations, however, resulted in some losses due to shrinkage, depredations of rats, spoilage, depreciation, differences in prices, and other factors over which the Executors and Trustees of the Estate had no control.

In 1930 the Trustees opened a Warehouse Account on their books for the purpose of maintaining a control account over materials purchased and not immediately issued. The items in the warehouse were handled in the same manner as those in the stores, resulting in the same relatively small losses. At the time of the partition physical inventories were made of all items in the stores and in the warehouses, and same were distributed as stated in the partition deeds, the merchandise in the warehouse at Kingsville being purchased by King Ranch Corporation for $1,726.97. The combined operating loss for the store and warehouse operations, including salaries paid the storekeepers, were $26,081.28, but after giving effect to the purchase of the supplies in the warehouse at Kingsville in the amount of $1,726.97, the net loss for the trust period was $24,354.31, which I find to be a proper charge against the estate.

45. Notes Payable

1. The notes with interest to April 1, 1925, aggregating $32,202.32 payable to the order of Sam Lewin, J. Alexander, Tessie Meyer and T. T. Vanderhoren five years from

date with interest at the rate of 7% per annum were executed by Mrs. H. M. King under date of July 14, 1917, in part payment for the purchase by Mrs. King from the payees of said notes of two tracts of land aggregating 5076.8 acres out of the Tomas De La Blanca five leagues 445 grant in Brooks County, Texas, (Defendant's Ex. 468 A to G inclusive). These notes were extended at maturity so as to become due in 1927. At the time of Mrs. King's death the property was a part of her property and the notes were liabilities of her estate. The executors and trustees paid the principal and interest on the notes in March and July, 1927.

2. On September 21, 1925, the estate paid to Robert J. Kleberg & Company two notes dated March 16, 1925, payable six months after date with interest at the rate of six per cent per annum each in the principal sum of $30,000.00 and executed by Robert J. Kleberg as attorney in fact for Mrs. King. These notes were given in payment of a part of the indebtedness of Kingsville Cotton Mill Company to Robert J. Kleberg & Co., described in paragraph 22 hereof. I find that said notes were liabilities of her estate executed in good faith by Robert J. Kleberg as her attorney in fact.

3. At the time of her death Mrs. King owned some lands upon which the school fund of the State of Texas held a lien for the unpaid purchase price of $46,718.46 (Ex. B part 1, p. 228; Ex. C, part 1, p. 217). Of this amount $36,493.35 was owing on portions of the San Antonio Viejo Ranch acquired by Mrs. King by purchase from T. T. East on March 25, 1922 (Plaintiff's Ex. 125; Defendant's

Ex. 202). The debt due the school fund was a part of the indebtedness assumed by Mrs. King in the above mentioned deed. On March 6, 1935, the estate paid this debt because since the liens covered portions of the ranch which was partitioned at the end of the trust, it was not practicable to partition same with the liens outstanding and unpaid. The remaining $10,225.11 of the indebtedness was a lien upon a part of the property devised to Richard King and his sisters. This debt was not paid by the estate and, at the partition, same was conveyed to them subject to the payment of this debt.

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4. At the time of her death Mrs. King owned the note of Maggie M. Hughes in the principal sum of $9,000.00 dated July 19, 1924, payable five years from date, secured by a lien on 189.2 acres of land, a part of share Z of the Palo Alto Farm subdivision in Nueces County, Texas, which was inferior to a lien held by Martindale Mortgage Company to secure a note in the principal sum of $11,124.60 payable in annual installments of $741.64 dated July 18, 1924.

Maggie M. Hughes owed the estate a balance of $6,298.92 on the note held by it but was unable to make further payments. The land was reconveyed to the estate on January 18, 1930, in cancellation of the note held by it and the assumption of the indebtedness due Martindale Mortgage Company, which, in addition to the note for $11,124.60, was represented by the following notes:

Note in the principal sum of $1,000.00 dated September 12, 1928, due January 1, 1934, with four interest notes

in the principal sum of $80.00 each due January 1, 1931, to January 1, 1934, inclusive.

Note in the principal sum of $840.00 dated September 12, 1928, with four interest notes in the principal sum of $67.20 each, due January 1, 1931, to January 1, 1934, inclusive.

The estate paid each of the notes as they came due, leaving a balance of $7,416.40 unpaid at the end of the trust. In the partition of the estate, this property was conveyed to King Ranch successor in title to Mrs. Alice G. K. Kleberg subject to the debt.

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On February 20, 1929, the estate borrowed $15,000 from San Antonio Loan & Trust Co. and executed its notes in that amount due one year from date with interest at the rate of 6¾% per annum. Acting upon the instructions of the estate, the San Antonio Loan & Trust Company remitted the proceeds of this note to W. E. Weathersbee to enable him to bring some cattle, upon which the estate had a lien, into the United States from Mexico. Weathersbee's account on the books of the estate was debited with the proceeds of this note and said account was ultimately paid with interest. No loss resulted to the estate in this transaction.

On April 14, 1930, the estate exchange an apartment building in the city of Kingsville, Texas, for 111.53 acres of land in Kleberg County, Texas, and as a part of the consideration therefor assumed the payment of the unpaid balance of $3,237.50 on a note held by the Republic National Bank of Dallas, Texas, payable in semi-annual installments of $87.50 with interest at the rate of 8% per annum. At

the end of the trust period, this property was conveyed to King Ranch successor in title to Mrs. Alice G. K. Kleberg subject to the unpaid balance on the note amounting to $2,362.50.

As a part of the purchase price of the Kimmel Farm described in paragraph 4 hereof, the estate assumed the payment of the unpaid balance of $5,332.38 on a note held by the Dallas Joint Stock Land Bank secured by lien on the Kimmel Farm. This note was payable in semi-annual installments of $227.50 each. At the end of the trust period the property was partitioned to King Ranch successor in title of Mrs. Alice G. K. Kleberg subject to the unpaid balance on the note amounting to $4,875.07.
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As part of the consideration for the purchase of the Barrera lands described in paragraph 4 hereof, the estate assumed the payment of the balance of $3,602.65 held by the Federal Land Bank of Houston. This property was a part of the San Antonio Viejo Ranch and the balance due of $3,396.71 was paid off to facilitate the partition as in the case of the School Fund debts.

On May 1, 1916, L. E. Appleby, as assignee for the benefit of the creditors of F. Z. Bishop, conveyed to Mrs. H. M. King 4,552.9 acres of land out of F. Z. Bishop's Palo Alto Subdivision in Nueces County, Texas, for the consideration of $227.65 in cash, subject to: 1. Twenty-six vendor Lien notes aggregating $137,232.00, the principal and interest theron being $157,817.00, held by Texas Farm Mortgage and Investment Company; 2. One hundred fifty six vendor lien notes, aggregating both principal and interest, $117,-172.00, held by Mrs. H. M. King; 3. All taxes (Plaintiff's Exhibit No. 649).

On the same day L. E. Appleby, as assignee of Bishop, conveyed to Mrs. H. M. King, 734.4 acres out of said F. Z. Bishop—Palo Alto Subdivision, for a consideration of $36.75, subject to thirty vendor lien notes, held by Mrs. H. M. King, the principal and interest thereon being $16,-690.00, and also subject to taxes (Plaintiff's Exhibit No. 648).

On the 28th day of October 1918, Mrs. H. M. King conveyed the properties described in the above mentioned deeds, together with other lands, to Mrs. Alice Gertrudis Kleberg, by General Warranty Deed, reciting the said conveyance was made in consideration "of the natural love, affection for, and loving gratitude to, her, my said daughter, Alice Gertrudis Kleberg." (Defendant's Exhibit No. 11.)

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From May 1, 1916, down to January 3, 1925, Mrs. H. M. King paid all of the interest becoming due upon the indebtedness held by Texas Farm Mortgage & Investment Company and made numerous payments upon the principal thereof.

On January 3, 1925, there was owing to Texas Farm Mortgage & Investment Company $117,582.86 principal and accrued interest of $1,467.30.

On December 30, 1924, Mrs. H. M. King acting through Robert J. Kleberg, Sr., as her attorney in fact, borrowed $114,000.00 for the San Antonio Loan & Trust Company (Plaintiff's Exhibit No. 166—Defendant's Exhibit No. 225), this note being secured by deed of trust on 23,900 acres of land in Nueces County, Texas (Plaintiff's Exhibit No. 421 "3").

On January 2, 1924, Mrs. H. M. King sent her check in the amount of $5,051.16 to the San Antonio Loan & Trust Company and, on January 3, 1925, San Antonio Loan & Trust Company paid the principal and interest upon said series of notes, aggregating $119,051.16, to Texas Farm Mortgage & Investment Company (Plaintiff's Exhibit No. 165—Defendant's Exhibit No. 204), and secured releases of said vendor's lien (Defendant's Exhibits 224 A to EE).

Subsequent to the death of Mrs. H. M. King the Executors and Trustees paid all interest coming due upon the note for $114,000.00 held by the San Antonio Loan & Trust Company as it accrued and on October 10, 1926, paid the principal of the note in full.

I find that the note was an indebtedness of the Estate
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and that the payment thereof by the Executors and Trustees was in all respects proper.

46. J. K. Northway

J. K. Northway was a veterinarian, primarily employed as the manager of the Santa Gertrudis Jersey Farm owned by Mrs. Alice G. K. Kleberg, but he was also an employee of the Estate, being paid a regular salary and receiving additional compensation from the Estate for speying cattle belonging to the estate.

On November 11, 1919, he borrowed $800 from Mrs. King and gave his note for that amount, due one year from date. This note was paid on December 31, 1930, by crediting the note with the amount due him by the Estate for speying cattle.

On May 1, 1921, Northway borrowed $1,215.00 from Mrs. King and executed his note due January 1, 1922 in that amount. At the time of Mrs. King's death there was a balance owing upon said note of $640.00. On October 15, 1928, this note was credited with the amount of $350 for cattle belonging to Northway and sold to the ranch on said date. On August 31, 1930, this note was credited with $21.60 interest and the principal balance of $290 for services rendered in connection with speying cattle.

On March 29, 1924, Northway purchased 756.4 acres of land in Kleberg County, Texas, from Mrs. King and as part payment therefor executed his note in the principal sum of $15,025.00, payable in installments of $1,502.50 with interest at the rate of 6 per cent per annum, the first installment becoming due and payable on the 29th day of March, 1925, and a like installment becoming due each and every year thereafter. This note was secured by vendor's lien
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upon the above described property which was inferior to the lien held by the Federal Land Bank in the amount of $10,500. No interest or principal was collected upon this note during the trust period and same was partitioned to Mrs. Alice G. K. Kleberg as being specifically bequeathed to her.

47. Credits on Notes Receivable

The books of the estate were kept on a cash receipts and cash disbursement basis and every item of both debits and credits was recorded on the books and the nature of the debit and credit fully shown. The credits to the notes receivable account which were represented by cash payments were entered on the cash receipts register and the non-cash credits to this account were shown in the journal.

The subsidiary notes receivable ledgers of the estate (Exhibits K and K 1) were not kept fully posted during the trust period, but all credits were posted to these exhibits during the course of the hearings. I find that all credits to notes receivable were proper except as may be found otherwise in other paragraphs hereof.

48. Credits on Accounts Receivable

The books of the Estate, including the subsidiary ledger, fully show all debits and credits to Accounts Receivable. The cash credits to this account are shown in the cash receipts register and the noncash credits appear in the journal. In addition, the subsidiary accounts receivable ledgers were kept fully posted in due course of business. I find that all credits to accounts receivable were proper except as may be found otherwise in other paragraph hereof.

49. Mrs. Richard King

Mrs. Richard King, the wife of Richard King, Sr., was indebted to Mrs. H. M. King at the time of her death in 452
the amount of $3,311.31 on open account. Mrs. Richard King died on November 17, 1925. No part of this indebtedness was paid during the trust and at partition same was charged with interest on daily balances at the rate of 6 per cent per annum to Richard King, Jr., and his sisters. (Defendant's Exhibit 122, Item XIX (8)).

50. T. A. Simmons, Jr.

At the time of Mrs. King's death, T. A. Simons, Jr., was indebted to her in the sum of $350.00 represented by his note dated September 15, 1924, payable to her order three months after date with interest at the rate of 8 per cent per annum.

On August 18, 1927, he borrowed $400.00 from the Estate and executed his note in that amount payable on January 1, 1928, with interest at the rate of 8 per cent per annum.

On November 3, 1931, he borrowed $1,000.00 from the Estate and executed his note in that amount, payable one year from date with interest at the rate of 8 per cent per annum.

No principal or interest was collected by the Estate upon these notes and, at partition, same were classified as bad and partitioned to plaintiffs and Richard W. Atwood. (Defendant's Exhibit 122.) At all times material hereto, Simons was insolvent and his notes were uncollectible.

T. A. Simons, Jr., was the abstracter at Kingsville, Texas. Between May, 1928, and July, 1932, he was employed by the Estate to prepare abstracts covering the properties of the Estate in Kleberg and other counties. In order for him to do this work, the Estate advanced him the total sum of $2,590.55 during that period, and in order
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to preserve a record of the expense until same was completed, charged these items to Simons as Accounts Receivable. In August, 1932, Simons paid the Estate $33.00 in cash, leaving a debit balance in the account of $2,557.55.

This account did not represent cash loans to Simons but represented the payment to him of expense incurred by him for the Estate, it being intended that when the work was completed and the bill for services was rendered, this account would be credited with the advancements made and the amount of the bill charged to expense.

In 1932, the Estate decided not to complete the abstract work and no further work was done by Simons. However, as he did not present his bill for services, the account was allowed to remain on the books. This account was one of those retained by the Executors and Trustees at partition and same was subsequently charged off.

51. M. H. Ruiz

In October, 1925, the estate sold M. H. Ruiz 29 head of old horses for $1,400.00. This sale was made on open account. Ruiz disappeared, taking the horses with him. The account was therefore uncollectible and same was properly charged off in December, 1931.

52. Ball Ranch and Other Leases

In February, 1926, the Executors and Trustees entered into a written contract (Plaintiff's Ex. 199; Defendant's Ex. 212 whereby they leased 20,804 acres of land, more or less, in Kenedy County, adjoining the Encino Ranch and other lands owned and operated by the King Estate known as the Ball Ranch, from W. A. Ball, et al., for a period of ten years ending April 1, 1936, at a rental of 35 cents per

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acre per year, payable semi-annually in advance it being also agreed that the improvements on the property were in good condition and that they should be maintained by lessee in a good state of repair. This ranch was highly improved with a frame ranch house and barn, two houses for Mexican labor, well constructed outside and pasture fences, and four flowing wells. Immediately upon the execution of this lease the Estate stocked it with cattle and continuously used and operated same until the expiration of the trust.

I find that the use of the Encino and Stillman Ranches was neeessary and advantageous to the estate and that the rentals paid thereon were reasonable.

In addition, the estate leased various other tracts of land as described in Exhibit B, Part 2, pages 176 to 180, inclusive, and Exhibit C, Part 2, pages 229 to 234, inclusive. I find that all of such properties so leased were necessary and advantageous to the estate and that the rentals paid thereon were reasonable.

53. Disposition of Ranch Lands

The inventory and appraisement and the audits list the lands owned by the Estate as shown by Mrs. King's books to have been owned by her at the time of her death. The Executors and Trustees made both purchases and sales during the trust period and recorded all of same on the books of the Estate. These are shown in detail in the audits.

The executors and Trustees did not set up on the books of the Estate lands which had been specifically devised to the heirs for immediate delivery but on the contrary delivered same to the beneficiaries as in the case of 19,228 acres more or less in Starr, Hidalgo, Crow and Upton
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Counties, Texas, devised in Article VI of the will to Richard King and his sisters, Mrs. Minerva King Patch and Mrs. Mary King Estill, the children of Richard King Sr.

In the case of the lands specifically devised under the terms of the will, the executors and trustees, at the end of the trust period, set aside to the several beneficiaries the properties to which they were entitled thereunder. In-

asmuch as plaintiffs herein, together with their brother Richard W. Atwood and their sister Elizabeth Atwood Baldwin and Mrs. Henrietta W. Page, were specifically devised undivided interests in certain properties, same were physically partitioned by the executors and trustees between said persons and their successors in title in accordance with the power and discretion given said executors and trustees under the terms of the will.

In the case of the lands not specifically devised by the terms of the will, the executors and trustees physically partitioned same between the persons entitled to receive them in proportions stipulated in the will to the extent of three-fourths of said residuary property and in proportions calculated under the laws of Descent and Distribution of the State of Texas to the extent of the remaining one-fourth thereof.

I find that the details of the partition are fully stated in the partition deeds and that said partition was fair and equitable.

Certain discrepancies in area exist between the lands owned by Mrs. King at the time of her death as shown by the books and those partitioned by the Executors and Trustees. I find that the acreage stated on the books was not based upon actual surveys upon the ground; that the
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trustees made diligent efforts to locate all of the lands owned by Mrs. King at the time of her death and by her Estate at the end of the trust period; that they recorded all purchases and sales of real estate made by them upon the books of the Estate; that any discrepancies in acreage have occurred through no fault of the Executors and Trustees; that either the books were in error as to the acreage

owned or that the Executors and Trustees failed to partition all of the real estate in spite of their diligent efforts so to do.

According to the inventory and appraisement, Mrs. King owned, at the time of her death, 916.92 acres of land, a part of the Cubage and Miller Subdivision of San Patricio County, Texas.

During the trust period the Estate sold 560 acres in the Cubage and Miller Subdivision of San Patricio County, Texas, and acquired 200 acres in said subdivision by reason of the cancellation of vendor lien notes executed by J. L. Anderson upon reconveyance of the property to the Estate. At the end of the trust period the Executors and Trustees partitioned only this 200-acre tract as all of the land owned by the Estate in said county. The discrepancy existing between the land in said county stated in the inventory and appraisement and the land sold during the trust period is 356.92 acres.

I find that this discrepancy has occurred through no fault of the Trustees; that if same was actually owned by the Estate it was not sold or otherwise disposed of by the Executors and Trustees and still belongs to the heirs of Mrs. King and that no loss has resulted to the Estate therefrom.

Findings in connection with the D. Sullivan and Seaburg, George and Taylor items may be found in Paragraph 38 hereof.

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54. Disposition of City Lots

At the time of Mrs. King's death, she owned numerous city lots located in Corpus Christi, Kingsville and Bishop,

Texas, some of which, in the case of lots in Corpus Christi, were devised for immediate delivery to Richard King and his sisters and the balance of which were specifically devised to Mrs. Alice G. K. Kleberg. The Executors made diligent efforts to locate all of these lots and to record same on the books of the Estate. All sales and purchases of lots were recorded on the books of the Estate and are detailed in the audits. At the end of the trust, the Executors and Trustees conveyed the lots remaining on hand to the persons entitled thereto under the terms of the will.

The lots held by John D. Finnegan, Trustee, belonged one-half to Robert Driscoll and one-half to Mrs. King and the acts of said trustee are fully described in Paragraph 6 hereof.

The lots owned by Rincon Improvement Company are referred to in Paragraph 34 hereof.

55. Notes Receivable at March 31, 1925

At the time of Mrs. King's death she owned notes receivable, secured and unsecured of the aggregate face value of $1,449,970.53. The value of these notes as of the date of Mrs. King's death was written down to $810,137.99, a difference of $639,832.41.

The auditors prepared a schedule explaining this difference and same was offered in evidence as Master's Exhibit 208. From this exhibit it appears that

1. Mrs. King's books overstated the face value of these notes by ..... $ 29,334.99

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2. Cash payments made to Mrs. King during her lifetime 158,614.92

3. Credits applied in exchange of other assets consisting of real estate, stock, accounts, etc., during Mrs. King's lifetime	87,109.08
4. Reduction to write down to fair value, unexplained differences and charges to bad debts	364,773.35
	$639,832.34

The reductions of $364,773.35 include the following:

1. A write down of $110,224.99, on the notes of Kingsville Cotton Mill Company, being the difference between the amount owed the Estate by that company and the value of the property mortgaged to secure the debt.

2. A write down of $122,850.00 on the notes of Kingsville Cotton Oil Mill Company, being the difference between the amount owed the Estate by that company and the value of the property mortgaged to secure the debt.

3. A write down of the notes of Lowrance and Carson aggregating $17,002.92 because same were uncollectible.

4. A write down of the note of L. Gonzales Trevino in the sum of $8,008.50 because same was uncollectible.

5. A write down of notes aggregating $21,351.34 listed in Master's Exhibit 208, Schedule D, because the chattels purchased by the makers of said notes from Mrs. King and upon which she retained a lien for security had been re-

turned to her during her lifetime or because the notes were barred by limitation prior to her death.
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6. A write down of notes aggregating $11,363.50 listed in Master's Exhibit 208, Schedule D, because of differences between the balances due as shown on the notes and those as shown on Mrs. King's books, all of which occurred during her lifetime and which were not explained by her books and records.

7. A write down of notes aggregating $215.80 which had been charged to bad debts on Mrs. King's books.

8. A write down of $73,756.30 to eliminate the liability of Robert J. Kleberg and R. Driscoll on the note of Robert J. Kleberg, et al., in the principal sum of $196,587.00 dated November 4, 1922, the details of which are as follows:

In 1921 Mrs. King owned some Liberty Bonds which she had received from J. R. Chapman in part payment for certain lands sold to him. At the solicitation of Joe Hirsch, the President and Manager of the Corpus Christi National Bank of Corpus Christi, Texas, these bonds were delivered to the bank and sold by it and the proceeds amounting to $224,112.98 were deposited in said bank to the credit of Mrs. King in a special account on which the bank paid interest, subject to withdrawal on thirty days' notice.

In 1922 Joe Hirsch came to Kingsville and in the presence of Robert J. Kleberg and Caesar Kleberg informed Mrs. King that the bank examiners were requiring that notes aggregating $196,173.83 be charged off and that unless cash could be obtained to substitute for said notes, the

bank would be closed. He asked Mrs. King to put up the money necessary to save the bank out of her special deposit and stated to her that if she would bear a part of the loss he thought he could induce his brothers Marx and Alcan

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Hirsch, who were stockholders in the bank, and who resided in the State of New York, to bear a part of same. He expressed the fear that if his brothers knew that Mrs. King was putting up all of the money, they would be unwilling to contribute and accordingly suggested that Robert J. Kleberg and Robert Driscoll, who were also stockholders in the bank, join Marx and Alcan Hirsch in the execution of a note to Mrs. King for the amount contributed to the bank, with the understanding that the said Robert J. Kleberg and Robert Driscoll would not be liable thereon and that Marx and Alcan Hirsch would be liable to the extent of one-half the amount therof.

At this time Mrs. King was the owner of 100 shares of the capital stock of the bank and was its largest depositor. The bank was the leading financial institution in the area in which the bulk of Mrs. King's property was located and she was therefore unwilling to permit the bank to fail. She therefore agreed to the plan proposed by Hirsch.

On November 4, 1922, a note in the amount of $196,-587.00 signed by Robert J. Kleberg and R. Driscoll, and purported to be signed by Marx Hirsch and Alcan Hirsch was delivered to Mrs. King (Plaintiffs' Exhibit 122A, Defendants' Exhibit 382). On November 8, 1922, Mrs. King's account in the bank was debited $198,587.00, and the notes aggregating $196,582.24, listed in Plaintiffs' Exhibit 122B, were transferring to her account as collateral security for the payment of the note. These notes were left

with the Corpus Christi National Bank for collection. On March 29, 1923, Marx and Alcan Hirsch wrote Robert J. Kleberg advising him that they had not executed the note dated November 4, 1922, in the amount of $196,587.00 (Defendants' Exhibit 379). In July, 1923, Caesar Kleberg, R. Driscoll and Marx Hirsch met in San Antonio, Texas, to discuss this dispute. As a result of this conference, 461
Alcan Hirsch delivered to Mrs. King 227½ shares of the capital stock of the bank in cancellation of his obligation to Mrs. King, and a new note was executed by Robert J. Kleberg, Jr., R. Driscoll and Marx Hirsch in the amount of $196,587.00. A credit of $51,026.85 was endorsed on the reverse of the note being one-fourth of the face of the note plus interest to date to reflect the delivery of the stock in cancellation of the debt of Alcan Hirsch (Plaintiffs' Exhibit 122, Defendants' Exhibit 383). To this note was also attached 227½ shares of capital stock of the bank owned by Marx Hirsch as collateral security for his liability thereon.

On July 14, 1923, Robert J. Kleberg as attorney-in-fact for Mrs. King, delivered a letter to R. Driscoll stating that at the time the original note was executed (November 4, 1922), Robert J. Kleberg for himself and as attorney-in-fact for Mrs. King had agreed that Driscoll would not be personally liable thereon, and that this arrangement was to be continued in connection with the execution of the second note (Defendants' Exhibit 380).

Certain collections were made upon the notes placed with the Corpus Christi National Bank for collection and certain dividends were paid upon the stock, all of which were applied upon the note, so that in the latter part of March,

1924, Marx Hirsch executed a note for $42,403.73, being one-fourth of the unpaid portion of the $196,587.00 note and also executed a note in the amount of $1,484.07 for interest thereon. On March 29, 1924, the Corpus Christi National Bank received this note from Marx Hirsch by mail and cancelled the note for $196,587.00 (Plaintiffs' Exhibit 122A; Defendants' Exhibit 383) upon the instructions of John D. Finnegan by marking same paid. Other items were collected and credited to this note so that
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on November 4, 1924, Marx Hirsch executed his note for $39,837.63 (Defendants' Exhibit No. 385), payable to the order of Mrs. H. M. King, due one year from date, with interest at the rate of six per cent per annum.

On August 30, 1926, the executors and trustees filed suit against Marx Hirsch and the Corpus Christi National Bank in the District Court of Nueces County, Texas, asking for judgement upon the note for foreclosure of the lien and to require the Corpus Christi National Bank to pay over dividends in the amount of $1,137.50, which had accrued upon said stock, to the holders of the note. At the time this suit was filed, Marx Hirsch was a resident of the State of New York (Defendant's Exhibit 386).

On October 8, 1926, the court entered a judgment in favor of the plaintiffs in the sum of $48,376.71, being $39,837.63 principal and $4,141.20 interest and $4,397.88 attorney's fees, ordered the defendant, Corpus Christi National Bank, to pay plaintiffs the sum of $1,137.50 to be credited upon said judgment, and further ordered the foreclosure of the lien upon the 227½ shares of the capital stock of the Corpus Christi National Bank (Defendants' Exhibit No. 387).

On December 8, 1926, the sheriff of Nueces County, Texas, acting in accordance with the order of sale issued by said court, sold said stock to the executors and trustees for the sum of $30,000.00 (Defendants' Exhibit No. 389).

The Executors and Trustees sold the 227½ shares of stock, acquired from Marx Hirsch at execution sale, to R. Driscoll on the 8th day of January, 1927, for $38,675.00. Between November 4, 1922, and February 27, 1931, the Corpus Christi National Bank collected $36,316.27 principal and interest on the notes held by it for collection. The remainder of the notes held by it were uncollectible. 463

I find that Mrs. King never intended that Robert J. Kleberg and Robert Driscoll should be liable upon the notes and that same were executed by them with the express understanding that they would not be liable thereon; that insofar as they were concerned the transaction had been completed prior to her death and that the write down of said note was in all respects proper and that the sale of the stock acquired by the estate at foreclosure sale was for a fair price.

I further find that the Executors and Trustees set up on the books all of the notes receivable as soon as the value of same had been determined and that while the auditors made increases in notes receivable on the books of the Estate, the unpaid notes themselves were at all times in the possession of the Executors and Trustees.

I further find that due to bookkeeping errors the aggregate amount of the notes receivable as stated in the general ledger control account exceeded the amount shown by the subsidiary notes receivable ledger by $23,696.21. These

errors, making up this difference, were traced by the auditors and are shown in Master's Exhibit 101. I find that the aggregate of the notes shown in the subsidiary note ledger was the correct amount of the notes receivable and that no loss resulted to the Estate from this difference.

56. Interest on Notes Receivable at March 31, 1925

At the time of Mrs. King's death the unpaid interest on the notes receivable owned by her was $108,663.14 as shown by the Inheritance Tax Report (Defendants' Exhibit 108). The collectibility of this interest was contested by the executors and trustees and was finally fixed at $97,142.87 by the estate tax authorities. This amount was set up on the books by Journal Entry 361 in December, 1931. During 464
the trust period $58,267.53 was collected and the uncollected balance of $38,875,36 was charged off in December, 1934.

I find that the executors and trustees were diligent in collecting interest and that the balance charged off was uncollectible.

57. Disposition of Notes Receivable

At the time of Mrs King's death she owned notes of the value of $810,137.99 (see Paragraph 55 hereof). During the period from April 1, 1925, to December 31, 1928, additions to notes receivable amounted to $162,327.63 and reductions in notes receivable amounted to $430,494.91, leaving a balance of $541,970.91 (Exhibit B, Part 1, p. 52). During the period from January 1, 1929, to December 31, 1934,

additions to notes receivable amounted to $170,265.20 and reductions to notes receivable amounted to $396,341.72, leaving a balance of $315,894.19 (Exhibit C, Part 1, p. 33). During the period from January 1, 1935, to March 31, 1935, additions to notes receivable amounted to $29,686.33 and reductions in notes receivable amounted to $11,544.72, leaving a balance on hand at said date of $334,035.80 (Defendants' Exhibit 78).

The total credits to notes receivable during the trust period amounted to $838,381.31 and the nature of each is fully shown by the subsidiary notes receivable ledgers of the Estate (Defendants' Exhibits K and K 1) by appropriate reference to the cash books and the journal. In addition to the cash payments made on these notes, credits were entered through the journal showing the application of credit balances on the books of the Estate in favor of various makers of the notes; deductions from the salary or wages of employees; application of executors' fees due
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by the Estate as in the case of Richard King, Jr.; the reacquisition of real and personal property in cancellation of notes; acquisition of property at foreclosure sale; extra compensation to employees as in the case of F. Fromme and John D. Finnegan; the renewal of notes; discounts allowed by the Estate and notes aggregating $40,043.69 considered uncollectible by the trustees and charged off.

I find that all of the above credits to notes receivable were proper, that the notes charged off were in fact uncollectible and that the Executors and Trustees made reasonable efforts to effect collection of same.

At the end of the trust the Executors partitioned to

the beneficiaries notes receivable in the amount of $305,160.30 (including the notes executed by the beneficiaries and members of their families which were paid in the manner set out in the partition deeds) and retained in their hands the notes aggregating $28,875.80, as follows:

1. Note of Elise A. Baldwin dated December 7, 1931, due one year from date with interest at the rate of 7% per annum in the principal sum of $600.00 balance due ..... $ 34.17

2. Note of Chapman Ranch, Inc., dated March 28, 1935, due six months from date with interest at the rate of 6% per annum in the pricipal sum of..... 4,055.83

3. Note of Chapman Ranch, Inc., dated March 28, 1935, due six months from date with interest at the rate of 6% per annum in the principal sum of..... 9,012.90

4. Note of Chapman Ranch, Inc., dated March 28, 1935, due one year from date with interest at the rate of 6% per annum in the pricipal sum of..... 15,772.60

The notes of the Chapman Ranch for $4,055.83 and $9,-012.90, respectively, together with interest thereon, were 466
paid to the Executors and Trustees on August 12, 1935.

The remainder of the notes were unpaid on September 1, 1939.

58. Accounts Receivable

The executors and trustees in the inventory and appraisement (Defendants' Exhibit 10) and the Inheritance Tax returns (Defendants' Exhibit 108) stated the value of accounts receivable at $68,959.20. Various adjustments were made to this account as a result of which the debits were increased to $91,340.77 arising principally on account of the increased valuation placed upon the account of Rincon Improvement Co. by the Estate Tax Authorities (Exhibit B, Part 1, pages 235 to 237, inc.)

The credit balances in this account at March 31, 1925, as adjusted by the auditors at $35,376.40 (Exhibit B, Part 1, page 86). I therefore find that the net debit balance of the accounts receivable ledger was $55,964.37 at the beginning of the trust.

With reference to the items alleged, in Paragraph 58 of Plaintiff's Bill of Particulars, to have been written down or charged off, I find as follows:

Robert J. Kleberg $8,428.28: The bookkeepers, during Mrs. King's lifetime, incorrectly debited the personal account of Robert J. Kleberg with items aggregating $8,428.28 which should have been charged partly to Robert J. Kleberg, Trustee (Ellis Ranch) and partly to Mrs. Alice G. K. Kleberg. These errors were discovered subsequent to the filing of the inventory but before the closing of Mrs. King's books and the account of Robert J. Kleberg was credited and the accounts of Robert J. Kleberg, Trustee,

and Mrs. Alice G. K. Kleberg were debited. No loss to
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the Estate resulted from this transaction (Master's Exhibits 4 and 12).

Robert J. Kleberg, Trustee (Ellis Ranch), $67,486.20 and $3,955.65: These items were not debts owing to the estate but were expenses incurred by Mrs. King in the acquisition of the Ellis Ranch in Bee and Goliad Counties, Texas, as stated in Paragraph 6 hereof.

John I. Kleiber $20,817.05: This item is a part of the expense of litigation in connection with the partition of the San Salvador del Tule Grant in Hidalgo County, Texas, as stated in Paragraph 32 hereof.

Miscellaneous advances to Ranch Employees $34,508.-80.

At the time of Mrs. King's death her employees were indebted to her for advances made by her to them in the amount of $34,508.80 similar to the advances made by the estate described in Paragraph 40 hereof (Exhibit B ,Part 1, page 7). I find this item to be uncollectible and that the failure of the trustees to set up same upon the books involved no loss to the Estate.

Richard King, Sr., $30,000.00—

On May 9, 1923, Mrs. King paid San Antonio National Bank $30,000.00 for the account of R. King, Sr., in payment of a note in that amount held by said bank and executed by Mrs. King and Richard King, Sr. This item was uncollectible at the time of Mrs. King's death for the reasons stated in Paragraph 30 hereof.

The following accounts were not set up upon the books of the Estate because same were barred by limitation or were in good faith considered uncollectible by the executors and trustees.

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Coller Publishing Company	$ 100.00
P. A. Chapman	5,977.28
A. L. & T. T. East	7,440.00
R. G. Flato	1,931.12
Gulf Coast Gin Company	9,665.93
Sarah Passmore	150.00
St. Louis, Brownsville & Mexico R. R.	374.90
James B. Wright	952.57
Richard King, Sr.	255,309.93
Rincon Improvement Co.	6.606.49

59. Disposition Of Accounts Receivable

On December 31, 1934, there was due the Estate by various of its employees for advances to them in excess of the wages due them the sum of $3,154.83. These advances had been paid to these employees to take care of sickness and other emergencies as described in Paragraph 40 hereof. Between December 31, 1934, and March 31, 1935, this amount was reduced by payroll deductions to $2,463.15.

Subsequent to March 31, 1935, the Executors and Trustees collected from the employees of the King Ranch and from the employees working upon the properties set aside to the Atwoods the sum of $1,833.18, leaving a balance outstanding in this account of $629.97 as of December 31, 1935. No collections have been effected since that date.

In 1927, the Estate overpaid the Government of the United States $11,364.00 on the Estate Income Tax for the year 1926. A claim for refund of this overpayment was filed and was subsequently allowed.

In December, 1934, this claim together with interest of $5,102.45, a total of $16,466.45, was entered on the books as an account receivable and same was paid in cash on March 30, 1935.

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In December, 1934, the Executors and Trustees entered on the books as an account receivable, interest due the Estate on the indebtedness of the heirs, amounting to $133,-006.12. Additional interest for the period beginning December 31, 1934 and ending March 31, 1935 amounting to $6,366.52 was also entered on the books in this account making a total of $139,372.64. This amount was charged to and collected from the heirs at partition (Defendants' Exhibit 122, Item XIX).

On March 31, 1935, there was a balance of $28,946.97 due the Estate by Rincon Improvement Company, secured by a mortgage on certain property in Brooklyn Addition to the City of Corpus Christi, Nueces County, Texas, said mortgage being executed many years prior to Mrs. King's death (see paragraph 34 hereof). At partition, this indebtedness was set aside to King Ranch, successor in title to Mrs. Alice G. K. Kleberg, as it was secured by a mortgage on land in Nueces County.

At the time of Mrs. King's death she had a claim against the Government of Mexico amounting to $15,000.00 This item was considered worthless by the Executors and Trustees but same was filed with the Mixed Claims Commission

established by treaty between the Government of the United States and the Government of Mexico. Although the claim was prosecuted with diligence throughout the trust, no final determination of the claim was made and same was partitioned at the end of the trust period between the King Ranch, the heirs of Richard King, Sr. and the Atwood heirs (Defendant's Exhibit 122 Item XX).

During the trust period certain accounts receivable were charged off by the Estate because they were uncollect-
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ible and during the trust period certain collections were effected upon the accounts so charged off. All of these are fully listed in Exhibits B & C .

I find that the Executors and Trustees used reasonable diligence to collect all accounts receivable and that those charged off were in fact uncollectible.

60. Livestock

At the time of Mrs. King's death she owned approximately 97,739 head of livestock of which 61,792 head were grown cattle and the remainder were calves running with the cows and horses, mules, goats and sheep. The number of head of livestock was arrived at by actual physical count shortly after Mrs. King's death and same were valued by the appraisers at $890,800.00. This value was subsequently increased by the Inheritance Tax Department of the Bureau of Internal Revenue to $990,958.42.

During the trust period the Estate capitalized on its books the value of the cattle as fixed by the appraisers and from time to time increased the value of same in accordance with the final value as fixed by the Inheritance Tax

Department. As cattle were bought by the Estate the cost thereof was also capitalized upon the books and as sales were made out of the cattle originally on hand or subsequently purchased, the inventory value or cost price of the cattle so sold was deducted therefrom.

No running inventory of cattle raised upon the Ranch during the trust period was placed upon the books of the Estate but the Executors and Trustees and their employees had reasonably accurate information as to the number, kind, quality and condition of all livestock on hand at all times.

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During the trust period, the Estate sold many thousand head of cattle for which it received the gross sum of $10,690,419.94. The total expense for freight, feed pasturage and commission (other than that incurred in the operation of the ranches) was $2,186,435.27, a net income of $8,419,784.67 (Defendants' Exhibit 21). Sales of other livestock (horses, mules, sheep and goats amounted to $71,023.15; Line 27, Defendants' Exhibit 12).

At the inception of the trust, the grown cattle belonging to the Estate were pastured upon the ranches approximately as follows:

Santa Gertrudis	12,000 head
Laureles	24,000 head
Norias West	7,000 head
Norias East	12,000 head
Encino	4,000 head
Stillman	2,000 head

same being the approximate safe carrying capacity of each of said ranches at said time.

On March 31, 1935, the Estate owned approximately 94,158 head of grown cattle valued at $2,353,950.00 in addition to the calves running with the cows. The number of cattle was arrived at by actual physical count on the ranches as follows:

Santa Gertrudis and Laureles	42,852
Norias East	19,063
Norias West	14,707
San Antonio Viejo	5,350
Encino and Ball	7,264
Stillman	4,372
Bee and Goliad (Berclair)	550

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same being the approximate safe carrying capacity of each of said ranches at said time.

The increase in carrying capacity of the ranches was due to the eradication of the fever tick, better improvements particularly fences and water facilities and the improvement of the quality of the cattle so as to better adapt them to the range.

I find that it would have been impracticable to have kept an accurate running inventory of the cattle on hand including those born on the ranch, that it is not customary for cattlemen to inventory such cattle and record same upon their books of account and that no loss resulted to the Estate by reason of the failure of the Executors and Trustees to place such an inventory upon their books.

At the partition, the Executors and Trustees divided the cattle and other livestock among the heirs in accordance with the will as stated in the partition deed. The division of the cattle so made was fair and equitable.

61. Cash

At the time of her death, Mrs. King had on hand cash in the amount of $52,079.82. During the trust period the Estate received cash in the sum of $18,884,356.92 of which there was on hand at March 31, 1935 the sum of $76,029.54.

All sums received by the Estate were recorded in the cash received register and all sums disbursed were recorded in the cash disbursed register and same are in balance with Exhibits B, C and D. No loss resulted to the Estate by reason of the accounting methods used with reference to cash receipts and disbursements.

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62. Improvements On City Lots

The only expenditure by the estate during the trust period for the improvement of city lots was for the improvement of the property occupied by Kingsville Publishing Company at a cost of $6,118.00, described in Paragraph 24 hereof. The remaining items, aggregating $116,285.91, set up as improvements on city lots on the books and in the audits, represent the amounts at which the estate set up the improvements on lots acquired by it in cancellation of notes and at foreclosure sale.

63. Miscellaneous Assets

At the time of her death, Mrs. King owned ranch equipment consisting of harness, saddles, wagons, tools, windmill parts, farm machinery parts and cow camp equipment of the reasonable value of $10,000.00. As same was already in use, this account was not placed upon the books of the Estate at the time of Mrs. King's death. The Estate con-

tinued to use the equipment and I find that no loss resulted to the Estate by reason of this transaction.

At the time of Mrs. King's death, she owned merchandise in the ranch stores valued at $7,741.97. Due to an erro. in addition this item was set up on the books of the Estate at $7,481.97, a difference of $260. This error was subsequently detected and correctly entered in the books, and I find that no loss resulted to the Estate by reason of this transaction.

At the time of Mrs. King's death there was due her the sum of $246.69 on agents accounts. This item was not set up on the books at the time of her death due to an error of the bookkeeper. The error was subsequently discovered and corrected and I find that no loss resulted to the Estate by reason of this transaction.

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64. Items Since Partition

The Executors and Trustees were not able to pay all of the expenses of partition including the cost of building the partition fences simultaneously with the partition of the property on March 31, 1935. They therefore retained in their hands and excepted from partition, $76,029.54 in cash, accounts receivable aggregating $38,472.64 including accounts payable amounting to $357.54, and notes receivable aggregating $28,875.80, described in paragraph 57 hereof.

During the period from March 31, 1935; to July 14, 1939, the Executors and Trustees collected notes receivable executed by Chapman Ranch, Inc., aggregating $13,068.73, and have on hand unpaid notes aggregating $15,707.07.

During said period the Estate paid $45.30 to J. L. Borrum, thus reducing its accounts payable to $312.24, which accounts were outstanding and unpaid on July 14, 1939.

Subsequent to March 31, 1925, accounts receivable were erroneously debited in the amount of $902.78 of which $126.00 was charged to A. L. East and $776.78 was charged to Mrs. T. T. East, thus increasing the account to $39,732.96.

The erroneous charge to A. L. East of $126.00, together with erroneous charges to L. B. Johnson and W. M. Wright aggregating $50.19, entered prior to March 31, 1935, were reversed, reducing the accounts receivable to $39,556.77.

Cash collection during the period further reduced accounts receivable so that on July 14, 1939, same amounted to $35,098.89.

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The balance of accounts receivable and payable are shown in Defendant's Exhibit 599. From this exhibit it appears that the Executors and Trustees have eliminated from accounts receivable the following:

Mrs. T. T. East	$ 776.78
T. T. East	12,743.04
T. A. Simons, Jr.	2,557.55

thus reducing accounts receivable to $19,021.52. I find that the item of $776.78 was erroneously charged to Mrs. T. T. East and that the charge off was proper; that the item of $2,557.55 charged to T. A. Simons, Jr., was also properly charged off in view of the findings made in paragraph 50 hereof.

The record does not show the reason for the charge off of the T. T. East item of $12,743.04 except that it is stated in Defendant's Exhibit No. 599 to be "settled by improvements."

During the period from March 31, 1935, to June 16, 1939, the Executors and Trustees effected certain collections and paid certain expenses, including the cost of the fences erected to carry out the partition, all of which are shown in Defendant's Exhibits 351 and 396. On June 16, 1939, there was still on hand in cash the sum of $1,843.09. I find that the expenditures so made by the Executors and Trustees during this period were proper charges against the Estate.

At the end of the trust period the Executors and Trustees set aside to Edwin B. Atwood and Alice B. Atwood, the plaintiffs herein, and to their brother, Richard W. Atwood, the properties described in the Atwood partition deed (Defendants' Exhibit 227) and requested that said Atwoods take immediate possession thereof. In addition to the real
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and personal property described in said deed there was also deposited to the Atwood account in the First National Bank in Kingsville, Texas the sum of $52,169.91 of which $48,663.41 was the property of plaintiffs herein and $3,506.50 was the property of Richard W. Atwood.

Since plaintiffs have refused to accept the properties partitioned to them, the Executors and Trustees have continued to operate said properties for the account of said plaintiffs in the same manner as they had done prior to the end of the trust period. These operations have been carried on by the trustees to the best of their skill and ability and have been highly successful.

During the period from March 31, 1935, to July 15, 1939, the Executors have sold cattle belonging to plaintiffs, collected certain notes set aside to them and have paid the expense of operating the properties, together with portions of the expense of this litigation, all as shown by the receipts and disbursements of the Atwood account (Defendants' Exhibits 469 to 473, inclusive).

In addition, the Executors and Trustees have paid off and discharged all of the indebtedness of the Estate charged to plaintiffs herein as described in the partition deed to the Atwoods (Defendants' Exhibit 227), except their proportionate liability upon the $3,000,000.00 note held by Humble Oil and Refining Company upon which has been paid the sum of $70,000.00.

On July 14, 1939, there was in the bank to the credit of the Atwood account the sum of $10,244.44 of which $6,895.90 was the property of plaintiffs and $3,348.54 was the property of Richard W. Atwood.

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I find that all of the acts of the Executors and Trustees in connection with the properties set aside to plaintiffs have been done in good faith, in the interest of plaintiffs, and that the expenditures made from the funds in the Atwood account are proper charges against same.

65. Conclusion.

No findings have been made herein upon matters not specifically mentioned in plaintiffs' Bill of Particulars filed in this cause on the 25th day of May, 1939.

Respectfully submitted,

Wilmer B. Hunt

Master in Chancery

EQUITY 74

522—FINDINGS OF FACTS AND CONCLUSIONS OF LAW PREPARED AND FILED BY THE TRIAL JUDGE UNDER RULE 52 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

(Filed August 11, 1944)

(Title omitted)

Statement of the Case:

This is a suit by Plaintiffs, part of the Devisees under the will of Henrietta M. King, deceased, against Defendants, Robert J. Kleberg Jr., Caesar Kleberg, Richard Mifflin Kleberg, John D. Finnegan, Samuel G. Ragland and Richard King Jr., Individually and as Trustees under such Will, and is pending on Plaintiff's Bill of Complaint, filed November 22, 1933, Plaintiffs' Supplement thereto filed April 28, 1936, and Plaintiff's Bill of Particulars, filed May 25, 1939. Because there is also pending Plaintiff's Second Amended Ancillary Bill of Complaint filed March 29, 1939, in which there is some difference of parties, and in which

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different questions are presented, the two matters have been heard separately under Rule 42, and this action against the Trustees is referred to as the Main Case. Jurisdiction is by reason of diversity of citizenship, and the amount in controversy, exclusive of interest and costs, exceeding the sum of $3000. The suit is:—(a) Against such Trustees for an accounting of their Trusteeship, and to recover for the Estate Judgment against them as individuals, for money etc., which it claimed they owe such Estate because of the alleged mismanagement thereof:

(b) To declare and impose in favor of the Estate a trust on and against any part of said Estate which has been improperly and unlawfully transferred or conveyed to any of the defendants, or to any person, firm or corporation under the control of Defendants; and

(c) To removed Defendants as such Trustees.

After the case was at issue, and on May 2, 1936, it was referred to Wilmer B. Hunt Esq., of Houston, as Special Master, to find and report the facts. The case remained before the Special Master until November 12, 1942, when he filed his Report. In his Report he gives a brief history of the Estate of Mrs. Henrietta M. King as follows:

"Mrs. H. M. King died on March 31, 1925.

Immediately upon her death Richard King Jr., and Robert Driscoll were appointed temporary administrators of her estate, and acted as such in the operation of the estate with the assistance of the persons named as trustees of the estate in the will, until same was admitted to probate.

On April 7, 1925, Richard King Jr., Robert J. Kleberg and Caesar Kleberg filed the Will (Plaintiff's Ex. A) for probate in the County Court of Kleberg County, Texas, and sought appointment as independent executors without bond, they being nominated as
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such in the Will together with James B. Wells, who had previously died (Defendants Ex 5)

On May 6, 1925, the will was admitted to probate and on the same date the independent executors qualified as such by taking the oath (Defendant's Exs. 6, 7, 8 and 9).

On April 24, 1926, the executors filed their inventory appraisement and list of claims (Defendants Ex 10) and on June 30, 1930, the Court entered an order approving the inventory and appraisement, closing said estate and dropping same from the docket, (Defendants' Ex. 20).

After making certain specific bequests, the will devised the residue of the Estate to Robert J. Kleberg, Caesar Kleberg, Richard King Jr., (the foregoing being also her independent executors) Robert J. Kleberg Jr., Richard M. Kleberg, Samuel G. Ragland and John D. Finnegan, as trustees, to be held in trust by them and the survivors of them for a period of ten years, at which time said trustees were directed to partition the property then remaining in their hands in accordance with the terms of said will. The Trustees immediately undertook the performance of said trust and continued to act as such until March 31, 1935, at which time they partitioned the principal assets of the estate, retaining in their hands certain monies, notes and accounts receivable pending the final partition of the estate."

During the period of time the case was before the Master, approximately 18000 typewritten pages of testimony were taken and transcribed by stenographers. There were more than 1000 exhibits. The Federal Rule of Civil Procedure having in the meantime become effective, and Plaintiffs' pleadings being quite indefinite, a Pre-Trial Hearing was held on May 10, 1939, and Plaintiffs were directed to file by June 1, 1939, Bill of Particulars, setting forth their contentions in detail. This was filed May 25, 1939. The Special Master in his Report finds the facts generally
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and upon each of Plaintiffs' contentions set forth in such Bill of Particulars. In due time, Plaintiffs filed Exceptions to the Special Masters' Report, and voluminous briefs

have been filed by the parties, combatting and supporting such Exceptions. While the case was before the Special Master, Plaintiffs filed an Original Ancillary Bill of Complaint and an Amended Ancillary Bill of Complaint, which were, on Motion of Defendants, dismissed for want of jurisdiction, and on March 29, 1939, as stated, Plaintiffs filed Second Amended Ancillary Bill of Complaint, which is pending but is not covered by the Findings and Conclusions.

On April 22, 1937, Plaintiffs filed here another suit, entitled Edwin K. Atwood et al v. Richard King Jr., et al, Equity 102, which is pending, and which is not covered by these Findings and Conclusions. It is perhaps proper to also say that Plaintiffs brought and prosecuted in this Court still another suit against Defendants and others, styled Edwin K. Atwood et al v Alice G. K. Kleberg et al, Equity 101, which was tried and appealed and Judgement affirmed (133 Fed (2d) 69; Fed (2d) 452).

On January 31, 1944, this case was tried on the merits, on the case as made by the original Bill of Complaint filed November 22, 1933, Amendment filed December 17, 1934, Supplement filed April 28, 1936, and Bill of Particulars filed May 25, 1939, and Defendants' pleadings in answer thereto, which for brevity is, as stated, referred to as the "Main Suit", There were offered in evidence at the trial the Special Masters' Report (subject to Plaintiffs' Exceptions thereto) the Record of approximately 18,000 typewritten pages as made before the Special Master, and approximately 1000 Exhibits offered before the Special Master.

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Findings of Fact:

(a) I have examined the Special Master's Report.

In addition to his general findings, there are contained therein findings on 63 separate and distinct complaints of Plaintiffs as set forth in Plaintiffs' Bill of Particulars.

Plaintiffs Exceptions to the general findings and findings on these 63 Complaints and the briefs supporting and combatting same have been examined, along with such parts of the Record as seemed necessary, and I conclude that under the Rules,[1] the Exceptions to the Special Masters' Report should be overruled, and such report as to the facts, approved.

This action does not include the Special Masters' Findings respecting the Partition, nor such Findings of the Special Master as may be Conclusions of Law.

(b) The Special Master's Report is adopted as Findings of Facts of the Court, except as to the Partition by the Trustees, which is not covered hereby.

[1] Rule of Civil Procedure No. 53, Subdivision e(2) is in part as follows:

> "In an action to be tried without a jury, the Court shall accept the Master's Findings of Fact, unless clearly erroneous."

Conclusions of Law.

I.

The Method of Accounting.

With respect to the accounting for which Plaintiffs pray, the Special Master says:

"Books of account were kept by the defendants for 527
the trust period and as their accounting herein de-

fendants introduced in evidence the following:

1. A profit and loss statement for the trust period taken from the books (said statement also including certain adjustments for the purpose of calculating net income to the estate and for the purpose of calculating trustees' commissions.)

2. An audit of the books ofthe estate for the period beginning March 31, 1925, and ending December 31, 1928, prepared by Ernst & Ernst, Certified Public Accountants (Plaintiffs' Ex. B) together with a statement prepared by the auditors, reconciling the books of the estate with the audit. (Plaintiffs' Ex. E)

3. An audit of the books of the estate for the period beginning January 1, 1929 and ending December 31, 1934, prepared by F. W. LaFrentz & Company, Certified Public Accountants (Plaintiffs' Ex C) together with a statement prepared by the auditors reconciling the books of the estate with the audit. (Plaintiffs' Ex. F)

4. A statement of the cash receipts and disbursements for the period beginning January 1, 1935 and ending March 31, 1935, taken from the books of the estate (Defendants Ex. D)

5. The partition deeds whereby the executors and trustees partitioned the property to King Ranch, a corporation, successor in title to Mrs. Alice G. K. Kleberg (Defendants' Ex. 122) to Richard King Jr., Minerva King Patch and Mary King Estill (Defendants' Ex. 442); to Edwin K. Atwood, Alice B. Atwood and Richard W. Atwood Defendants Ex. 227).

6. A schedule showing the details of the items and calculations included in the partition deeds, (Defendants Ex. 218)

7. Statements showing the cash receipts and disbursements for the period beginning April 1, 1935
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and ending June 16, 1939, as to the items reserved from partition (Defendants' Exs. 351 and 396).

8. The books of account kept by the executors and trustees covering the properties set aside to the plaintiffs and to Richard W. Atwood (they having failed and refused to take possession of same) for the period beginning April 1, 1935 and ending July 15, 1939 (Defendants' Exs 469 to 473, inc.,)

In addition to the above, during the hearings numerous schedules taken from books and records of the estate prepared by F. W. LaFrentz & Company were offered and received in evidence together with books of accounts themselves.

I find that the executors and trustees administered the trust diligently and in good faith; that the partition made by them was fair and equitable; that they have fully accounted to plaintiffs for their acts as exetors and trustees except as same may be affected by the findings hereinafter made on the points raised in Plaintiffs' Bill of Particulars."

It clearly appears that the Defendants exhibited all of their books, papers and accounts before the Special Master, and that Plaintiffs had full opportunity to and did examine same and to place in their Bill of Particulars their specific complaints with respect thereto.

I conclude that in view of the provisions of the Will, this method of accounting is sufficient and that the Trustees in this case have discharged their full duties under the Law and that the Plaintiffs' complaint with respect thereto is not meritorius.

Special Masters' Findings
Nos. 1, 2 and 3. Compensation.
of Trustees, Expenses of Trustees
and Fees of Executors.

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The Will appoints eight persons, to wit: Robert J. Kleberg Sr., Samuel G. Ragland, Caesar Kleberg, James B. Wells, John D. Finnegan, Richard M. King, Robert J. Kleberg Jr., and Richard King Jr., Trustees and makes provision for their compensation as follows:

> "Said Trustees, their survivors or successors, after first paying to themselves, and each of them, and retaining in their hands, respectively, all traveling or other expenses whatsoever incurred, or paid out in any manner, in, about or growing out of the discharge of their duties as such Trustees, shall receive and retain in their hands, Monthly or Quarterly, as they may elect, as and to be their FULL AND ONLY COMPENSATION, as such Trustees, a sum, per annum, to be equally divided between them, equally, equal to ten (10%) of all of the net revenues or monies, which may come into their hands, annually, as such Trustees, after first paying all of the expenses and taxes and all other Public Charges or Dues and current debts, necessarily incident to the discharge of their duties as such Trustees."

The Will also appoints Robert J. Kleberg Jr., James B. Wells, Caesar Kleberg and Richard King Jr., as Executors of her Will and Estate. No limitation was placed upon the Compensation of the Executors, and the Executors were therefore, entitled to the fees fixed by Texas Law, i.e., 5% on all receipts and 5% on all disbursements, excluding cash

on hand at the time of the death of the testator and excluding disbursements to beneficiaries in the final settlement, etc.

The fees actually paid the Executors as found by the Special Master are well within, in fact very much less than provided by the Statute.

Likewise the compensation paid the Trustees is well within, in fact less than half that permitted by the Will. I conclude that Plaintiffs' Complaint with respect to the 530
compensation of the Trustees and Executors and with respect to the traveling expenses of the Trustees is not meritorious.

III.

Special Masters' Findings Nos. 3 and 4.

Rent of Lands and Purchases of Lands.

I conclude that the renting and purchasing of lands by the Trustees as found by the Special Master are within the terms of the Will, and not illegal.

IV.

Special Masters Finding No. 6.

Trustees debts to the Estate.

I conclude that under the Special Masters' Findings, Plaintiffs are not entitled to complain with respect to the handling by the Trustees of the matter of debts of the Trustees owing to the Estate.

V.

Special Masters' Finding—No. 7.

Mineral Interest.

The questions involved in the Special Masters' Report as to Mineral Interest and the Exceptions of the Plaintiffs thereto, clearly appear to have been disposed of in Cause Eq. No. 101, Edwin K. Atwood, et al v Alice G. K. Kleberg et al (133 Fed (2d) 69; 135 Fed (2) 452) but should I be mistaken in this, I do not think under the Special Masters' Report, Plaintiffs' Complaint is meritorius.

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VI.

Special Masters' Findings Nos. 8, 9 and 10.
Improvement on the Encino, Stillman and Ball Ranches; Improvements on the Santa Gertrudis Ranch; Santa Gertrudis Operating Expense.

I conclude that, based upon the facts found by the Special Master, and considering the provisons of Mrs. King's Will, the action of the Trustees with respect to these three items was lawful.

VII.

Special Masters' Finding No. 11.

Taxes paid by the Trustees.

I conclude that under the Special Masters' Report as to Taxes paid by the Trustees, Plaintiffs have no ground for complaint.

VIII.

Special Masters' Finding Nos. 15 and 16
Special Expense Account and Donations.

I conclude that Plaintiffs have no ground for complaint with respect to the facts found by the Special Master as to the donations of the lots to the Presbyterian Church of the City of Brownsville, nor with respect to the San Antonio Cemetery Lots, nor with respect to the various and numerous donations set forth in detail in the Special Masters' Report.

IX.

Special Master's Finding No. 17
Interest paid by the Trustees.

The Trustees were, under the terms of Mrs. King's Will not only permitted but required to carry on the busi-
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ness of the Estate, pay the indebtedness, and readjust indebtedness, which involved the borrowing of money and payment of interest. I conclude that the payment of Interest in connection with the large estate and over the long period of time during which they administered it, is not unreasonable.

X.

Special Masters' Finding No. 28.
Legal Expense

I conclude that the Legal Expense found by the Special Master is not unreasonable. It is clear that the Trustees charged to "Legal Expense", not only the amount paid to attorneys, but all expenses for abstracts, court costs etc., in fact all expenses of a legal nature.

XI.

Special Masters' Finding No. 35.

Life Insurance Purchases by the Trustees

I agree with the Special Master and conclude that the Life Insurance Policies purchased by the Trustees were purchased in the exercise of good business judgment and for the benefit of the Estate and for the protection of creditors.

XII.

The foregoing conclusions appear to cover the complaints of Plaintiffs respecting the major matters handled by the Trustees. To discuss each Finding of the Special Master would unreasonably prolong these Conclusions, and I regard it as sufficient to say that I have examined all his Findings and have concluded that none of them require or would support a judgment herein for Plaintiffs.

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Nor do Plaintiffs point out, independently of such Findings, any evidence which entitles them to judgment.

Judgment for Defendants. Let proper Decree be drawn and presented.

T. M. Kennerly

United States District Judge

386 FINDINGS OF FACTS AND CONCLUSIONS OF LAW PREPARED AND FILED BY THE TRIAL JUDGE UNDER RULE 52 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Filed May 15, 1945

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Equity No. 74

Plaintiffs' Second Amended Ancillary Bill of Complaint, Filed March 29, 1939
Edwin K. Atwood and Alice B. Atwood, et al., Plaintiffs
versus
Robert J. Kleberg, Jr., et al., Defendants

Equity No. 102

Edwin K. Atwood, et al., Plaintiffs
versus
Richard King, Jr., et al., Defendants

Thomas Hart Fisher, of Chicago, Illinois, and Baker, Botts, Andrews & Wharton, (Brady Cole), of Houston, Texas; For Plaintiffs

Denman, Franklin & Denman, of San Antonio, Texas; Robert W. Stayton, of Austin, Texas; Kleberg & Eckhardt, of Corpus Christi, Texas; B. D. Tarlton, of Corpus Christi, Texas; Andrews, Kelly, Kurth & Campbell, of Houston, Texas; and R. E. Seagler, of Houston, Texas; For Defendants

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STATEMENT OF THE CASE

In stating the case, it is necessary to refer to four law suits in this Court (these two and two others that have already been disposed of)—all arising under the Will, and

in connection with the Estate, of Mrs. Henrietta M. King, deceased, and all begun and prosecuted by plaintiffs, who are part of the Devisees under such Will.

(a) **The two already disposed of are:—**

Equity No. 74, Edwin K. Atwood, et al. v. Robert J. Kleberg, Jr., et al., MAIN CASE, which was a suit by Plaintiffs against the Trustees under such Will for an accounting, etc. Findings of Fact and Conclusions of Law were filed therein August 11, 1944, and Final Decree in favor of Defendants entered therein September 7, 1944.

Equity No. 101, Edwin K. Atwood, et al. v. Alice G. K. Kleberg, et al., involving the oil, gas and other minerals belonging to the Estate, in which Final Decree in favor of Defendants was entered September 28, 1940, from which Plaintiffs appealed and which was affirmed, 133 Fed. (2d) 69, 135 Fed. (2d) 452.

(b) **These two cases are:—**

Equity 74, Edwin K. Atwood, et al. v. Robert J. Kleberg, Jr., et al., on Plaintiffs' Second Amended Ancillary Bill filed March 1939, attacking the Partition of Mrs. King's Estate made by the Trustees under such Will.

Equity 102, Edwin K. Atwood, et al, v. Richard King, Jr., et al., also attacking such partition.

Since these two cases involve the same matter (the
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Partition of such Estate), they have been tried together, and these findings and Conclusions cover both.

The Partition was made by the Trustees March 31, 1935, and Plaintiffs in these two suits claim with respect to such Partition:—

(a) That the Trustees in making same erroneously construed the Will.

(b) That it was not made at the time and in the manner directed by the Will

(c) And that it was not correctly or fairly made.

Findings of Fact.

(a) There is no dispute that there is diversity of citizenship and proper value and that there is Jurisdiction here.

(b) The Record in the accounting suit Equity 74 (Main Case), consisting of approximately 18,000 typewritten pages of testimony taken before the Special Master, together with approximately 1000 exhibits, and the Special Master's Report, consisting of 102 printed pages, are part of the Record in these two cases. Exceptions were filed to the Special Master's Report, and such Exceptions and voluminous briefs have been examined. Such Exceptions have been and are overruled, and such Report is adopted as Findings of Fact herein. There seems no good reason for quoting the Report here, but applicable portions of it may referred to or quoted from in the Conclusions of Law.

(c) The Record in Equity 101, Edwin K. Atwood, et al., v. Alice G. K. Kleberg, et al., involving the oil, gas

and other minerals, etc., tried in thisCourt, and as stated 389
appealed (133 Fed. (2d) 69, 135 Fed. (2d) 452), is also a part of the Record in these two cases. Applicable portions of it may referred to or quoted from in the Conclusions of Law.

(d) Mrs. Henrietta M. King, under whose Will and in connection with whose estate this litigation arises, died March 31, 1925. She was the widow of Captain Richard King, who died in 1885. They had four children who lived to maturity, to-wit:—

Richard King, Sr., one of the Devisees in the Will;

Ella M. Welton, mother of Henrietta M. Welton Page, one of the Devisees in the Will;

Alice Gertrudis Kleberg, one of the Devisees in the Will;

Mrs. Henrietta M. Atwood, mother of Edwin K. Atwood, Alice B. Atwood, and Richard W. Atwood (distracted), Plaintiffs herein, and of Elizabeth Atwood Baldwin, all of whom are Devisees in the Will.

Mrs. King left vast holdings of land, livestock, and other property. The land area was as large or larger than some of the New England States. A copy of her Will is in evidence. Applicable portions thereof may be referred to or quoted from in the Conclusions of Law.

(e) Mrs. King was an extraordinary woman. Her Will is an extraordinary and unusual one. From the time of the death of her husband, Captain Richard King, in 1885, until her death in 1925, she was the owner and head of their vast estate. She was engaged not only in cattle raising on a large scale, but in developing the country

along industrial, educational, and religious lines. She encouraged and helped finance the building of railroads, 390
cotton gins, banks, manufacturing plants, etc. She was mindful of the cultural, educational and religious needs of the people on and in the vicinity of her property, and encouraged and helped finance the building of schools, churches, and many other similar institutions. She was interested in good government and at times active politically and made many political contributions. She was devoted to her children, grandchildren, and other relatives, to whom she loaned money, made gifts, advances, etc.

She appears by her Will to have undertaken, through the Trustees named therein, to project herself forward for a period of ten years from and after her death, in that she undertook to give her Trustees the same powers and have them carry on her affairs in the same way that she would have done herself if living. I do not regard her Will as creating purely a money or property trust, but I regard it as an effort on her part to have her Trustees, some of whom were her relatives, and all or most of whom had been her trusted employees or associates for many years, to carry forward for ten years the great and beneficent work that she herself had carried forward since the death of her husband.

(f) The Will was duly probated, and the Trustees named therein, and/or their successors, administered the Estate for ten years, and then, as required by the Will, partitioned it.

Lengthy written Instruments, Partition Schedules, Partition deeds, etc. executed by the Trustees and others in

making such Partition are in evidence. Applicable portions thereof may be referred to or quoted from in the Conclusions of Law.

I think and find that the Plan of Partition was fair, and that the Partition itself was Fairly, Properly, Equit-
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ably, and Lawfully made, except as to the creation of the Special Trust for Richard W. Atwood, as hereinafter fully discussed. More specific statements as to the Partition are made in the Conclusions of Law.

(g) As has been stated, Plaintiffs' Second Amended Ancillary Bill of Complaint, filed March 29, 1939, in Equity 74, and Plaintiffs' First Amended Bill of Complaint filed March 17, 1939, in Equity 102, both seek to set aside the Partition made by the Trustees. In Equity 102, Plaintiffs, in their pleadings, do not go into details, but in general terms attack the Partition, but in Equity 74 (Second Amended Ancillary Bill of Complaint), they, in their pleadings, go into details and make specific charges and complaints. In the Conclusions of Law which follow, each specific charge and complaint is taken up and discussed.

Conclusions of Law.

1:—Was the Partition Prematurely Made?

(a) Subparagraph (a) of Paragraph 10 of Plaintiffs' Second Amended Ancillary Bill of Complaint, reads as follows:

> "The Trustees should have paid the indebtedness of the trust estate in full on or prior to March 31, 1935,

and should have secured the release of said mortgage upon all of the lands comprising the trust estate on or prior to said date, and the trustees should not have purported to partition or distribute any part of the trust estate until their entire indebtedness was paid."

I do not agree with plaintiffs, and conclude that their contentions are not meritorious.

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I think and conclude that under the wording of the Will, the Trustees were not only permitted, but were required to Partition at the expiration of 10 years from and after Mrs. King's death, without regard to whether the debts were or were not paid at that time. Besides, the evidence shows that the Partition was made subject to such debts, i.e., a part of the debts being fixed against each interest, and that at the time of this hearing, the indebtedness has been largely and materially reduced. Also that the part thereof fixed against Plaintiffs' interest has been wholly paid off and discharged.

(b) Subparagraph (b) of Paragraph 10 of Plaintiffs' Second Amended Ancillary Bill of Complaint reads as follows:

"The trustees should have accounted to the beneficiaries for their acts and doings as trustees prior to March 31, 1935, and in view of the pendency of the original Complaint herein undetermined seeking such an accounting the trustees should not have purported to partition and distribute the trust estate unless and until such accounting should have been completed and a final non-appealable decree based thereon should have been entered herein."

Subparagraph (i) of Paragraph 11 of Plaintiffs' Second Amended Ancillary Bill of Complaint reads as follows:

"That no statement of the assets and properties comprising the trust estate and no inventories or other statements of the assets and properties purported to be partitioned and distributed have ever been submitted to the plaintiffs or their attorneys; that the defendants herein are fully advised as to the assets and properties comprising the trust estate on the date of such purported partition and distribution, and both prior and subsequent thereto, but that the plaintiffs
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have no such knowledge and it is impossible from the information presented or available to the plaintiffs to trace the assets from the trust estate through the purported partition and distribution thereof to the persons to whom the same were purportedly conveyed and delivered.

I think and conclude that under the Will, the Trustees were neither required nor permitted to delay the partition in order to make the accounting. But if they were, I think the accounting made was entirely sufficient.

There was a full and complete audit up to December 31, 1934, available to all interested persons, which at the time of the partition (March 31, 1935) had been sufficiently brought to date to enable all interested persons to know the condition of the estate, and to enable the Trustees to make the partition. The evidence shows that the trustees notified plaintiffs of this and that they intended to make the partition, but plaintiffs, through their counsel, declined to participate.

The Record shows that after making such Partition Plaintiffs were advised fully and in detail thereof. The Special Master reports on this point as follows:

"At the end of the trust period the Executors and Trustees set aside to Edwin B. Atwood and Alice B.

Atwood, the plaintiffs herein, and to their brother, Richard W. Atwood, the properties described in the Atwood partition deed (Defendants' Exhibit 227) and requested that said Atwoods take immediate possession thereof. In addition to the real and personal property described in said deed there was also deposited to the Atwood account in the First National Bank in Kingsville, Texas, the sum of $52,169.91 of which $48,663.41 was the property of plaintiffs herein and $3,506.50 was the property of Richard W. Atwood.

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Since plaintiffs have refused to accept the properties partitioned to them, the executors and trustees have continued to operate said properties for the account of said plaintiffs in the same manner as they had done prior to the end of the trust period. These operations have been carried on by the trustees to the best of their skill and ability and have been highly successful.

During the period from March 31, 1935, to July 15, 1939, the executors have sold cattle belonging to plaintiffs, collected certain notes set aside to them and have paid the expense of operating the properties, together with portions of the expense of this litigation, all as shown by the receipts and disbursements of the Atwood account (Defendants' Exhibits 469 to 473, inclusive).

In addition, the executors and trustees have paid off and discharged all of the indebtedness of the estate charged to plaintiffs herein as described in the partition deed to the Atwoods (Defendants' Exhibit 227), except their proportionate liability upon the $3,000,000.00 note held by Humble Oil & Refining Company upon which has been paid the sum of $70,000.00.

On July 14, 1939, there was in the bank to the credit of the Atwood account the sum of $10,244.44 of which

$6,895.90 was the property of plaintiffs and $3,348.54 was the property of Richard W. Atwood.

I find that all of the acts of the Executors and Trustees in connection with the properties set aside to plaintiffs have been done in good faith, in the interest of plaintiffs, and that the expenditures made from the funds in the Atwood account are proper charges against same."

The Record also shows that in the accounting suit (Equity 74, Main Case), each and all of the transactions of the Trustees during the ten-year or more period which plaintiffs desired to examine were examined before the Special Master, including many audits and all papers, 395

books, accounts, etc. The 18,000 pages of typewritten evidence and more than 1000 exhibits, constituting the Record in Equity 74, Main Case, and in these cases, make this clear. In the accounting suit (Equity 74, Main Case), the Special Master reported on each complaint of plaintiffs set forth in Plaintiffs' Bill of Particulars in that suit. That Report was examined by the Court, both as to the Law and Facts, and approved, and, as stated, is a part of the Record in this case. The Plaintiffs' contention in that suit was found not meritorius, and Final Decree against Plaintiffs was entered September 7, 1944.

(c) In Subparagraphs (c), (e) and (f) of Paragraph 10 of Plaintiffs' Second Amended Ancillary Bill of Complaint, it is said:

"The trustees should have caused appropriate proceedings to be instituted to determine the validity of the mineral trust agreement dated March 1, 1919, and

should not have purported to partition and distribute the trust estate unless and until such proceedings should have been terminated and the validity of said agreement adjudicated.

The trustees should have caused appropriate proceedings to be instituted to avoid the mineral leases to Humble Oil & Refining Company aforesaid, and should not have purported to partition or distribute the trust estate unless and until such proceedings should have been terminated and the validity of such mineral leases adjudicated.

The trustees should have caused appropriate proceedings to be instituted to reclaim the 3/32nds mineral interest aforesaid and should not have purported to partition and distribute the trust estate unless and until such proceedings should have been terminated and the rights of the trustees therein adjudicated."

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Plaintiffs contentions are not meritorius. All these questions were litigated in Equity 101, Edwin K. Atwood, et al. v. Alice G. K. Kleberg, et al., in this Court, in which judgment was rendered against Plaintiffs, which was affirmed by the Circuit Court of Appeals (133 Fed. (2d) 69, 135 Fed. (2d) 452). The Record in Equity 101 is, as stated, in evidence here.

Under the ruling in such case, it is clear that the minerals are a part of the land. They were so regarded in the Partition. While in the above quoted paragraphs of plaintiffs' Second Amended Ancillary Bill, there is no complaint regarding the Partition of the minerals, it is deemed proper to say that such Partition of the minerals is shown by the evidence to have been fair and equitable. Oil development since the Partition also shows this is to be true.

The Judgment in Equity 101, Atwood v. Kleberg, also fixed the rights of the Humble Oil & Refining Company under the transactions with it and leases to it. I think also the method of handling oil royalties is proper.

(d) If there is any uncertainty in the Will about the time the Partition should have been made, then I think the Will clothes the Trustees with full discretionary power, and it was within their sound discretion, to determine and fix the time. I find nothing to indicate that they have abused that discretion.

2:—In Making The Partition, the Trustees Necessarily Construed the Will. Did They Correctly Construe It?

(a) The first question is with respect to the Trustees' conclusion as to the Special Bequest to or the Special Trust 397
Fund for Richard W. Atwood, Testator's grandson, who was then and yet is of unsound mind.

Mrs. King in the Will devises certain property to certain persons (See first eight paragraphs of the Will). She then devises and bequeaths to the Trustees the "rest and residue" of her Estate. "In Trust for the following Purposes and Dispositions" etc.

Then follows Subdivisions I, II and III of the Will. In Subdivision I, after setting forth certain powers of the Trustees, and making provisions for their handling of the property of the Estate, it is said:—

> "And that, out of any such monies, or proceeds, as may at any time come into their hands as such trustees, during the period of this Trust, my said trustees,

the survivor or survivors of them, shall and will, after always first making due provisions, for payment of, and paying, when due, and any and all Federal, (United States), or State, inheritance, income, or other Federal State, County, District, City taxes, or other public taxes or charges whatsoever,—and any and all the charges and expenses of executing and conducting this Trust, —if they then have left sufficient funds thereof,—pay monthly to, and for, their support and maintenance:"

Then follows Subparagraphs 1 to 6 of Subdivision 1, directing that monthly payments of money be made to Richard King, Alice Gertrudis Kleberg, Mrs. Henrietta Welton Page, Edwin B. Atwood, Alice B. Atwood, Elizabeth (Elise) Atwood. Then follows Subparagraph 7 of Subdivision I, as follows (underscoring (italics) mine):—

7th: To be expended by my said trustees, for the
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care, support and maintenance of my grandson, Richard K. Atwood, the sum, monthly, of Three Hundred Dollars $300.00

But, should my said grandson, Richard K. Atwood, then not have fully and permanently recovered his mind and health, at the time of the expiration of the period of this Trust, and such Final Partition and Distribution, of all of my said Estate, as herein provided, then and in that event my said Trustees, shall and will, **before so partitioning my said estate, a** create a special Trust Fund for, and place in Trust, such a sum of money as in their discretion, may be necessary, and as will produce, monthly, not less than three hundred dollars ($300.00) per month, to be payable monthly, for the continued care, custody and maintenance of my said grandson, Richard W. Atwood during his life, which sum so then to be placed In Trust, by my said Trustees, shall, upon his death, be then paid by the

Trustee then holding the same, to his said Three (3) sisters and brothers, if then living, or, if then dead, to their descendants then living, in equal shares, taking by representation and not by numbers — but, should my said grandson, Richard W. Atwood, at any time before his death, and before the expiration of this Trust, and of the Final Partitioning of my said estate, fully and permanently recover his health and mind, then and in that event, said Three Hundred Dollars, ($300.00) per month, shall be paid directly to him,— and upon the final partition of my estate his said In Trust Share of my said estate, upon its final partition, be delivered to him ,if then fully recovered, otherwise, to be divided, in equal shares, between his said brothers and sisters, and their then descendants then living, taking by representation and not by numbers."

This Special Trust Fund is in addition to the property devised and bequeathed to Richard W. Atwood under Subdivisions I and II of the Will.

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I conclude that while the Special Trust Fund for Richard W. Atwood **does not have priority** over the taxes and debts of the Estate, nor the Special Bequests and Devises set forth in the second, third, fourth, fifth, sixth, seventh, and eighth paragraphs of the Will, that it **does have priority** over the bequests and devises set forth in Subdivisions II and III thereof, and that such Special Trust Fund should have been set up by the Trustees prior to or along with the Partition.

But the Trustees say that the debts would have consumed all of the properties set forth in Subdivisions II and III of the Will. If this be correct, it is clear that by wise mangement, the trustees so handled the matter of debts

that they did not consume such properties, thus making it possible for them to set up such Trust Fund, and I think it should have been done.

It does not follow, however, that by this ruling as to the Richard W. Atwood Special Trust Fund, the whole Partition will be struck down. It will not. Suitable provisions will be made in the Decree, fixing the sum necessary to set up such Trust Fund as a charge against the respective portions of the parties to the Partition, and requiring them to surrender or turn over to the Trustees sufficient Funds or other property out of their portions as may be necessary to set up and constitute such Trust Fund. Also making all other necessary readjustments. The details of setting up the Trust Fund is, under the Will, in the hands of the Trustees, but this may if necessary be supervised by the Court.

(b) The next question is whether the trustees were correct in concluding that some of the property of the estate, or rather an interest in certain property of the estate, was not disposed of by the Will.

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In Subdivision II of the Will, the Testator devises certain property to certain persons, to wit:—

To Richard King, her son, she devises certain property and then a one-fourth interest in certain property. In doing so, she uses this language:—

> "(g) One equal fourth (¼), of all the money, notes, stocks, bonds, choses in action, or other personal or mixed property not herein otherwise devised, or bequeathed, which may, at the time of such Final Partition of my estate, then remain and be, in the

hands of my said trustees, the survivor, or survivors or successor or successors of them or either of them, and subject to such Partition;

(h) One equal fourth (¼) of all other property, real, personal or mixed, not herein otherwise specially enumerated, or devised or bequeathed, which my said trustees, the survivor or survivors, or successor or successors of them, or either of them, then belonging to my said estate, may then have and hold, and subject to such partition."

To her daughter, Alice Gertrudis Kleberg, she devises certain property and then a one-fourth interest in the same property in which she devised a one-fourth interest to Richard King. She uses identical language, as follows:—

"(d) One equal fourth (¼) of all of the money, notes, stocks, bonds, choses-in-action, or other personal, or mixed property, not herein otherwise devised or bequeathed, which may, at the time of such final partition of my estate, then remain and be, in the hands of my said trustees, the survivor or survivors, or successor or successor of them, or either of them, and subject to such Partition;

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(e) One equal one-fourth (¼) of any and all other if any, Property, real, personal or mixed, not herein otherwise specially enumerated, or devised or bequeathed which my trustees, the survivor or survivors, or successor or successors of the, or either of them, then belonging to my said estate, which my said trustees may then have and hold, and subject to such Final Partition."

To her grandchild, Mrs. Henrietta M. Page (only child of her deceased daughter, Mrs. Welton), and to her grandchildren, Richard W. Atwood, Edwin B. Atwood, and

Elizabeth Atwood (among whom are Plaintiffs), she devises certain property (one-half to Page and the other one-half to the Atwoods). She then devises to such grandchildren (Mrs. Page and the Atwoods) an undivided one-fourth interest in the same property in which she devised a one-fourth interest to each Richard King and Alice Gertrudis Kleberg. She uses identical language, as follows:

> "(d) One equal one-fourth (¼), of all of the money, notes, stocks, bonds, choses-in-action, or other personal or mixed property, not herein otherwise specially devised or bequeathed, which may, at the time of such final partition of my estate, then remain and be in the hands of my said Trustees, the survivor or survivors, or successor or successors of them, or either of them and subject to such final partition;
>
> (e) One equal one-fourth (¼), of all other property, if any, real, personal or mixed, not herein otherwise specially enumerated, or devised or bequeathed, which my said trustees, the survivor or survivors, or successors or successors of them, or either of them, then belonging to my estate, may then have and hold, and subject to such final partition."

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It will be observed that the other or remaining one-fourth in such described property is left undisposed of, and the question for decision is what became of it.

The Trustees claim that it was not disposed of by the Will, and passed under the Texas Laws of descent and distribution to Mrs. King's heirs. They so treated it in the Partition, and defendants concur in that view. But plaintiffs claim that it passed under the Will to the Atwoods, including plaintiffs.

Defendants point to plaintiffs' Original Bill, filed herein November 22, 1933, and say that therein plaintiffs construed the Will with respect to such one-fourth interest just as the Trustees construed it in the Partition. This, plaintiffs deny. Defendants point to the Findings of Fact and Conclusions of Law of this Court in Equity 101, and say that this Court construed the Will with respect to such interest just as the Trustees construed it in making the partition. This, plaintiffs' deny. Defendants point to the Opinion of the Circuit Court of Appeals in Equity 101 (133 Fed. (2d) 69, 135 Fed. (2d) 452) and say that that Court construed the Will with respect to such interest just as the Trustees construed it in the Partition. This, plaintiffs deny.

Without deciding who may be correct in the three instances mentioned, I have examined the question anew and independently, and have reached the conclusion that the Trustees were correct in construing the Will as they did, i.e., that such one-fourth interest was not disposed of by the Will, and passed to the heirs of Mrs. King. It is true that there are many expressions in the Will that the Testator was disposing of her entire estate, but she did not do so. She left such one-fourth interest undisposed of.

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3:—Was the Plan of Partition Fair, and Was it Fairly and Properly Made?

(a) In their Second Amended Ancillary Bill of Complaint, Plaintiffs charge that the Plan of Partition was unfair and that the Partition was not properly made and unfair in a number of respects, especially with respect to the debts of the estate.

The Plan of Partition is shown by the Partition Schedules. The Trustees first set aside to the persons entitled thereto and their assigns the property specially devised in the first eight paragraphs of the Will. The Trustees then partitioned that portion of the estate referred to as the "residue", i.e., the properties described or dealt with in Subdivisions II and III of the Will. Each portion set aside was charged with a fair proportion of the debts.

At the time of the partition, the face amount of the debts owed by the Estate was $4,020,604.16. The then present value or amount thereof was $2,236,762.46. As stated, these debts were apportioned. The apportionment was made as stated in Partition Schedule IX, from which I quote as follows:

> "Each of the said respective debts are apportioned between the King Ranch, corporation, the descendants of Richard King, Sr., and the Atwoods, as follows: They are apportioned first against the residuary personal property bequeathed to each, next against the residuary real property devised to each, and after exhausting both of those items same has then been apportioned against the personal property specifically bequeathed to each in the proportions of the value thereof received by each. The calculations are as follows:"

Then follows the figures showing the amount of the debts each Devisee was required to pay.

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At the time of this trial, all that plaintiffs were required to pay had been paid, and the amount that the other Devisees were required to pay had been reduced to $800,000.

The evidence shows beyond question that this method of handling the debts was fair and equitable; in fact, I think it was the best method that could have been devised.

(b) Subparagraph (h) of Paragraph 11 of Plaintiffs' Second Amended Ancillary Bill of Complaint reads as follows:

> "That the trustees failed to inform or advise the plaintiffs that the trustees contemplated making a partition and distribution of the assets and properties comprising the trust estate on or about March 31, 1935, or at any other time; that by reason of such failure the plaintiffs were deprived of the opportunity to be present and to make certain that the real and personal property purported to be partitioned and distributed to them was a fair and just partition and distribution and was lawful and equitable; that the plaintiffs had no knowledge that such purported partition and distribution were contemplated by such trustees and were not present and did not participate in any manner whatever in such purported partition and distribution, and did not in any way authorize, approve or confirm the same."

The evidence shows the facts to be to the contrary. The Record shows that in the summer of 1934, the Trustees took up with plaintiffs, or their counsel, the matter of the partition. The correspondence between them runs until about November or December, 1934, when plaintiffs finally declined to take part in a partition.

(c) Subparagraph (d) of Paragraph 11 of Plaintiffs' Second Amended Ancillary Bill of Complaint reads as follows:

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> "That the cattle and other animals comprising the

livestock appertaining to the lands aforesaid and comprising a part of the residuary of the trust estate consisted of over 160,000 head; that the trustees purported to partition and distribute to the plaintiffs approximately 7,700 head of livestock out of said total; that the plaintiffs were entitled at the time of the partition and distribution aforesaid to not less than 60,000 head; that the quality and character of the livestock purported to be partitioned and distributed to the plaintiffs were inferior to the quality and character of the livestock to which the plaintiffs were entitled under said Will and were inferior in quality and character to the livestock partitioned and distributed by the trustees to the other beneficiaries under said Will."

The partitioning of the cattle and other livestock was probably more difficult than any other kind of property. I quote from the Report of the Special Master with respect thereto:

"At the time of Mrs. King's death she owned approximately 97,739 head of livestock of which 61,792 head were grown cattle and the remainder were calves running with the cows and horses, mules, goats and sheep. The number of head of livestock was arrived at by actual physical count shortly after Mrs. King's death and same were valued by the appraisers at $890,800.00. This value was subsequently increased by the Inheritance tax department of the Bureau of Internal Revenue to $990,958.42.

During the trust period the estate capitalized on its books the value of the cattle as fixed by the appraisers and from time to time increased the value of same in accordance with the final value as fixed by the Inheritance Tax Department. As cattle were bought by the Estate the cost thereof was also cap-

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italized upon the books and as sales were made out of the cattle originally on hand or subsequently purchased, the inventory value or cost price of the cattle so sold was deducted therefrom.

No running inventory of cattle raised upon the Ranch during the trust period was placed upon the books of the estate but the executors and trustees and their employees had reasonably accurate information as to the number, kind, quality and condition of all livestock on hand at all times.

During the trust period, the estate sold many thousand head of cattle for which it received the gross sum of $10,690,419.94. The total expense for freight, feed, pasturage and commission (other than that incurred in the operation of the ranches) was $2,186,-435.27, a net income of $8,419,784.67 (Defendants' Exhibit 21). Sales of other livestock (horses, mules, sheep and goats amounted to $71,023.15; Line 27, Defendants' Exhibit 12).

At the inception of the trust, the grown cattle belonging to the Estate were pastured upon the ranches approximately as follows:

Santa Gertrudis	12,000 head
Laureles	24,000 head
Norias West	7,000 head
Norias East	12,000 head
Encino	4,000 head
Stillman	2,000 head

same being the approximate safe carrying capacity of each of said ranches at said time.

On March 31, 1935, the estate owned approximately 94,158 head of grown cattle valued at $2,353,950.00 in addition to the calves running with the cows. The

number of cattle was arrived at by actual physical count on the ranches as follows:

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Santa Gertrudis and Laureles	42,852
Norias East	19,063
Norias West	14,707
San Antonio Viejo	5,350
Encino and Ball	7,264
Stillman	4,372
Bee and Goliad (Berclair)	550

same being the approximate safe carrying capacity of each of said ranches at said time.

The increase in carrying capacity of the ranches was due to the eradication of the fever tick, better improvements particularly fences and water facilities and the improvements of the quality of the cattle so as to better adapt them to the range.

I find that it would have been impracticable to have kept an accurate runing inventory of the cattle on hand including those born on the ranch, that it is not customary for cattlemen to inventory such cattle and record same upon their books of account and that no loss resulted to the estate by reason of the failure of the executors and trustees to place such an inventory upon their books.

At the partition, the executors and trustees divided the cattle and other livestock among the heirs in accordance with the Will as stated in the partition deed. The division of the cattle so made was fair and equitable."

As stated by the Special Master, the Partition Deeds show the Partition of the cattle and other livestock and how such partition was made.

I have examined the Record, and concur in the Findings of the Special Master. The evidence does not support plaintiffs' contention that they did not receive their fair and proper share of the livestock, nor that what they did receive
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are inferior in quality and character to those received by others in the partition.

(d) Subparagraph (e) of Paragraph 11 of Plaintiffs' Second Amended Ancillary Bill of Complaint reads as follows:

> "That the quality and character of the notes and accounts receivable purported to be partitioned and distributed to the plaintiffs were inferior to that to which plaintiffs were entitled under said Will and to the quality and character of the notes and accounts receivable partitioned to the other beneficiaries under said will."

The evidence shows that this charge is unfounded. Partition Schedule VII shows that the Trustees divided the Notes and Accounts (other than Notes and Accounts Owing by Devisees under the Will) into three classes, i. e., Good, Doubtful, and bad, and each Devisee was awarded his portion of each class. Some of the Devisees were given cash in lieu of some notes and accounts in order to equalize the division.

The evidence clearly shows that the Partition of such notes and accounts was fair and equitable.

(e) Subparagraph (f) of Paragraph 11 of Plaintiffs Second Amended Ancillary Bill of Complaint reads as follows:

> "That said purported partition and distribution fails to take into account any of the improvements on

the lands comprising the residuary trust estate under Mrs. King's will; that the lands purported to be partitioned and distributed to the plaintiffs as aforesaid are not improved with wells, tanks, mills, fences, traps, shipping pens, buildings and other improvements, including grubbing whereas the lands to which plaintiffs are lawfully and equitable entitled under said will are improved as aforesaid; that during the period from

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March 31, 1925, to March 31, 1935, the trustees invested many millions of dollars in improving all of the lands comprising a part of the residuary trust estate under Mrs. King's will; that the trustees made grossly and inequitably unfair and unjust allocations of the improvements to the lands of the beneficiaries other than the plaintiffs, and the trustees failed in and by said purported partition and distribution to take into account the improvements as aforesaid and to pay or credit to the plaintiffs the amounts to which the plaintiffs are lawfully and equitably entitled by reason of said improvements; that the trustees likewise made large investments during said ten year period in wagons, farm equipment, trucks, automobiles, saddles, camp equipment, and many other items of personal property, and placed the same upon the lands of the estate other than the lands which were purported to be partitioned and distributed to the plaintiffs, whereas the plaintiffs are entitled to receive one-fourth of all of said personal property pursuant to the terms of said will; that the trustees have failed to make any lawful or equitable adjustment in relation to said personal property not so partitioned and distributed to the plaintiffs, or to pay to the plaintiffs the fair value thereof towhich plaintiffs are lawfully and equitably entitled."

The Special Master (Paragraphs 8 and 9 of his Report) examined into these questions and reported thereon. The matter of the reasonableness and propriety of the improve-

ments made by the Trustees over the entire Estate, including Plaintiffs' portion, was considered and disposed of in the Accounting Suit (Equity 74, Main Suit), but has been again examined. The Report of the Special Master (Paragraph 9) as to improvements on the Santa Gertrudis Ranch devised to Mrs. Kleberg, which it seems is Plaintiffs' chief complaint, is as follows:

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"During the trust period the estate expended the sum of $451,115.81 for the purpose of improving the 174,791.36-acre tract owned by it and the 30,439.23 acres leased by it from Mrs. Alice G. K. Kleberg, known as the Santa Gertrudis Ranch, as follows:

Buildings and Barns	$ 59,505.90
Fences and Corrals	141,569.24
Windmills	19,044.12
Water Troughs	38,501.10
Wells	61,931.27
Cisterns (Red figure)	95.27
Dipping Vats	3,971.33
Machinery	64,442.09
Wagons and Harness	2,988.23
Telephone Line	528.44
Automobiles and Trucks	38,160.88
Furniture and Fixtures	1,969.81
Water System	1,935.60
New Highway	16,663.07

(Defendant's Ex. 37.)

At the partition the cost of the new highway ($16,663.07) was deducted from the improvement account and charged to Mrs. Alice G. K. Kleberg (Defendant's Ex. 122, Item XIX (22) making the net cost of new improvements $434,452.74. The books do not differentiate the improvements made on the 30,439.23-acre tract from those made on the larger tract.

I find the improvements made to these properties were made in good faith by the executors and trustees, that same were necessary to the economical operation of said properties and that the cost thereof was reasonable.

During the trust period the estate also expended the sum of $236,891.30 for repairs to the improvements upon the Santa Gertrudis Ranch including the 30,439.23-acre tract leased from Mrs. Kleberg as follows:

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Buildings and Barns	$ 78,132.90
Water Facilities	62,292.37
Fences and Corrals	96,466.03

I find that such repairs were made in good faith by the executors and trustees and were necessary for the economical operation of the properties; that such repairs as were made to the improvements on the 30,439.23-acre tract were less than those reasonably called for under the terms of the lease and that the improvements on the 30,439.23-acre tract were less valuable at the end of the trust period than they were at the beginning thereof in spite of the repairs and improvements to same."

The evidence does not support Plaintiffs' claim that they were unjustly or unfairly treated with respect to the making by the Trustees of improvements on the property of the estate nor in the partition.

(f) Subparagraphs (a) and (b) of Paragraph 11 of Plaintiffs' Second Amended Ancillary Bill of Complaint reads as follows:

"That the lands purported to be partitioned and distributed to plaintiffs as aforesaid were not the lands specifically devised and bequeathed to them nor the

lands to which plaintiffs are entitled under said will of Mrs. King; that the lands aforesaid in which plaintiffs are entitled to an undivided 3/16th interest consisiting of the 'San Juan de Carricitos Grant' and 'The Big Barreta Grant' lie in Willacy County and in Kenedy County, State of Texas; that the taxes per acre payable yearly on such lands in Kenedy County are a small fraction of the taxes payable yearly on such lands in Willacy County; that the same is true of the school taxes, that the county taxes in Kenedy County have been approximately 3½c per acre per year, whereas the same taxes in Willacy County have been in excess

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of 20c per acre per year; that the only fair and equitable partition of the lands to which plaintiffs and defendants are jointly entitled under Mrs. King's will would be for the plaintiffs to share in the Willacy and Kenedy Counties lands equally; that the trustees purported to partition and distribute to the plaintiffs lands which lie substantially or wholly in Willacy County, and none in Kenedy County;

That the quality and character of the lands purported to be partitioned and distributed to the plaintiffs as set forth in said partition deeds from the 'San Juan de Carricitos Grant,' 'The Big Barreta Grant,' the lands on Padre Island and all of the lands comprising part of the residuary of said trust estate were inferior to that to which said plaintiffs were entitled under said Will and inferior in quality and character to the lands partitioned and distributed to the other beneficiaries; that that portion of the lands aforesaid purported to be partitioned and distributed to the plaintiffs is covered with white oak and mesquite brush and is loose sandy land and what is known as soap weed flats and is covered with large areas of what is known as sand blowouts, whereas the lands to which plaintiffs are lawfully and equitably entitled under said will consists of open prairie loam lands free and clear of brush,

blowouts, soap weed flats, and sand; that the lands purported to be partitioned and distributed to the plaintiffs are not well watered either by rainfall, springs or other water below the surface of the ground and are not arable, whereas the lands to which plaintiffs are lawfully and equitably entitled under said will are well watered by rainfall, springs and other subterranean water and are arable."

The evidence shows that at the time of the Partition, Plaintiffs owned an undivided three-eighths (3/8) interest (devised to them by the Will) in the land mentioned, and that King Ranch (a corporation) owned the other undivided
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five- eighths (5/8) by mesne conveyances from Elizabeth A. Baldwin and Henrietta W. Page, et al., Devisees of such interest under the Will. The method of dividing such land is set forth in the Deed from the Trustees to Plaintiffs, from which I quote as follows:

"Whereas, the said lands out of the San Juan de Carricitos and The Big Barreta Grants consists of one solid body of land situated in Kenedy and Willacy Counties, Texas, containing approximately three hundred seventeen thousand seven hundred ninety (317,790) acres; and the said land on Padre Island consists of approximately six thousand (6,000) acres of land; and in the partition thereof the Trustees have set aside and partitioned off as an equal five-eighths (5/8) of the said lands belonging to the said Estate in the San Juan de Carricitos and The Big Barreta Grants, the north five-eighths (5/8) thereof, as hereinafter described to the King Ranch, the said corporation, and the north five-eighths (5/8) of the said Padre Island lands to the said corporation;

The said five-eighths (5/8) of the total acreage of the lands belonging to the Estate of Henrietta M. King in the said San Juan de Carricitos and The Big Barreta Grants (that is, all the acreage belonging to the said Estate in The Big Barreta Grant and a sufficient amount of the acreage belonging to the estate in the San Juan de Carricitos grant to constitute five-eighths (5/8) of the entire acreage) was taken out of said body of land and set aside to the King Ranch, corporation, by drawing a line across the same from east to west parallel with the south line of Kenedy County and at a sufficient distance therefrom so that five-eighths (5/8) of the total acreage lies to the north of said partition line, and the said acreage lying north of said partition line so drawn was set aside to and has been conveyed to the King Ranch, corporation, by deed of even date herewith; and

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the three-eighths (3/8) of said total acreage lying south of the said partition line has been set aside to the said Atwoods, the acreage lying south of the said partition line being approximately one hundred twelve thousand four hundred twenty-one and 36/100 (112,421.36) acres. But the portion so set aside to the said Atwoods shall include all the acreage lying south of the said partition line whether the same be more or less than the said number of acres."

The evidence shows this method of partition of such land to have been lawful, fair and equitable, and that the portion awarded to plaintiffs was their fair and just portion.

(g) Subparagraph (g) of Paragraph 11 of Plaintiffs' Second Amended Ancillary Bill of Complaint reads as follows:

"That the plaintiffs are lawfully and equitably entitled to share in each and all of the real and personal property purported to be partitioned and distributed to

the other beneficiaries as set forth in said partition deeds; that the real and personal property purported to be partitioned and distributed to the plaintiffs under said partition deeds was not the real or personal property specifically devised to the plaintiffs under said will nor the real and personal property to which the plaintiffs are lawfully and equitably entitled under said will; that the plaintiffs were given undivided interests in all of said real and personal property and that the partition and distribution of said real and personal property by the trustees under said will should have been by conveying to the plaintiffs their undivided interests therein."

Under the will, there were parts of the Estate in which plaintiffs took no interest whatever. There were other parts in which they took undivided interests under the Will. There
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were other parts not disposed of by the Will in which they took undivided interests as heirs of Mrs. King. The Trustees in making the Partition took all these various interests into consideration. Plaintiffs' charge that the Partition was, for the reasons they state, unfair finds no support in the record.

(h) Subparagraph (c) of Paragraph 11 of Plaintiffs' Second Amended Ancillary Bill of Complaint reads as follows:

"That the following lands and other purported by the Trustees to be specifically devised under Mrs. King's will and purported to be partitioned and conveyed by the trustees to the defendants were not devised specifically as the trustees claim but were devised by said Will as part of the residuary of the trust estate thereby created and plaintiffs are therefore entitled to an undivided 3/16th interest therein.

Acres	Lots	
1,175		LaBlanca Grant, Brooks County (undivided interest) (D. Sullivan)
8.44		Kleberg County (Chas. H. Flato)
	4	Corpus Christi (tax sale)
189.2		Nueces County (M. M. Hughes)
3.6		Kleberg County (Maurice Flato)
13.58		Kleberg County (J. P. Olsen)
	2	Kingsville (Kleberg T. & I. Company)
198.98		Kleberg County (Yoakum Estate)
185.39		Nueces County (Kimmel)
	2.	Kingsville (80 acres) (Sheriff sale)
852		Kleberg County (H. Andrews)
111.53		Kleberg County (G. S. Thomas)
322.50		Kleberg County (D. Rotge)
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	2 (and frac.)	Kingsville (Ragland Merc. Co.)
	2	Kingsville (Lots 12 and 13, Bl. 47 King. 1st Subdivision)
15.51		Kingsville (Kingsville Cotton Mills)
	5	Kingsville (Mrs. J. D. Finnegan)
	12	Kingsville (Kingsville Cotton Oil Mill Co.)
1.84		Kleberg County (Anton Bueler)
900		Brooks County (W. M. Doughty)

9,292.50		Hidalgo County	(W. M. Doughty)
511		Brooks County	
200		San Patricio	(Anderson)
245		Brooks County	(Survey 573)
	51	Bishop	(Driscoll Trust)
	2	Bishop	(Block 8)
	2	Riviera	(7-31-30)
	26	Corpus Christi	(Sheriff sale)
	16	Corpus Christi	(Brooklyn Add.)
	2	Corpus Christi	(Block 175)
	114	Corpus Christi	(Judgement sale)."

The action of the Trustees with respect to the W. M. Doughty 10,192 acres in Brooks and Hidalgo Counties, which Plaintiffs mention, was before the Court and disposed of in the accounting suit (Equity 74, Main Suit). The Plaintiffs now complain about their disposition in the Partition. The Special Master reports as follows:

> "Among the lands directed by the Will to be set aside to Richard King and his sisters if on hand at the end of the trust were Los Indios Pasture of 5,027 acres, El Venadito Pasture of 1,774.1 acres, and LaComa, two tracts of which, containing 500 and 599.2 acres respectively, are concerned herein, the said tracts aggregating 7,900.3 acres, all a part of the San Salvador del Tule grant. These tracts were separated from the remainder of the San Salvador del Tule lands belonging to her.
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> They had never been ranched by her, and the defendants did not deem it practicable for the ranch to operate them because they were comparatively poor ranching property and poorly watered and improved, separated from the other lands, very brushy, and at that time in-

fested with Texas fever ticks and adjoined by lands so infested. Walter Doughty of Hidalgo County owned a tract of land of 10,192.5 acres in Hidalgo County adjoining the main body of Mrs. King's lands in the San Salvador del Tule Grant, which had the advantages for ranching purposes which the other lands lacked. It was subject to a first lien in favor of H. P. Drought & Company of San Antonio for approximately $42,000, and a school debt owing to the State of Texas. Doughty owed to Mrs. King a note executed to her during her lifetime for $20,000, less a $1,000 payment on account, secured by a second lien on his 10,192.5 acre tract. The Trustees entered into a contract with Doughty whereby they contracted to exchange upon the performance of the following conditions by Doughty the above mentioned Los Indios, El Venadito and the small tracts out of the La Coma, a total of 7,900.3 acres, for Doughty's 10,192.5 acre tract. The contract was an executory contract and provided that before the completion and transfer of titles by deeds Doughty should clear his land of the Drought mortgage and should pay an additional sum to the Trustees of $19,000, in addition to the $19,000 balance on the original $20,000 note. To raise these sums Doughty was to subdivide the lands under contract to him by the Estate, colonize and sell them off, and pay the proceeds of such sales towards the liquidation of his contract. In the meantime he was to have possession of the lands contracted to him, of which the estate was getting no use, and the estate was to take possession of his lands, the use of which were valuable to it. The estate agreed to lend money to Doughty to pay the taxes on the premises in the meantime, and the interest on the Drought mortgage, and also, by verbal separate agreement, agreed to finance him on cattle to stock the pastures he was receiving possession of and

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nearby pastures operated by him. The contract also provided that in case of postponement past one year in the consummation, no interest was to be charged

Doughty (the estate having possession and use of his premises). In accordance therewith, each party took possession of the respective lands. The estate, instead of advancing the money direct to Doughty to pay the interest and taxes and for cattle operations, as agreed upon, had the Bank of Robert J. Kleberg & Company make the advances on the King Estate's guarantee of payment. The contract remained in effect for a number of years and Doughty was unable to colonize or sell any of the property or to meet the payments; and shortly before the expiration of the trust the trustees retained and took back the land which they had contracted to sell to Doughty (except El Venadito 1,774.1 acre tract) and also took the 10,192.5 acre tract which he had contracted to deed to the estate in exchange and also took the cattle that he owned, subject to the mortgage to H. P. Drought and Company and cancelled all claims against him.

According to the books of the estate, the losses on the land deal were $24,230.30 (line 58, Defendant's Exhibit 12) and on the cattle deal $100,641.72 (line 49, Defendant's Exhibit 12). The actual loss suffered by the Estate in these transactions, however, was much less inasmuch as the Estate had the use of the Doughty land and the cattle received by the estate from Doughty were worth much more than the $10.00 per head valuation placed upon them on the books of the estate. As a part of the transaction, Doughty turned over to the estate 3,083 head of cattle, valued for bookkeeping purposes at $10.00 per head or $30,830.00. It appears that 2,559 head of these cattle were worth $68,197.89. The record does not show the value of the remaining 524 head, nor does it show the rental value of the 10,192.5 acre tract. It is, therefore, impossible to calculate the actual loss suffered by the estate.

I find that the executors and trustees entered into

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their dealings with Doughty and the Bank of Robert

J. Kleberg & Company in good faith and in the belief that same would be for the benefit of the Estate. I further find that they allowed Doughty to retain the El Venadito 1,774.1 acre tract in order to avoid litigation.

At the partition of the estate the property involved in this transaction was conveyed to Richard King and his sisters, subject to the outstanding indebtedness to H. P. Drought & Company."

The evidence does not show the disposition of such Doughty lands, in the Partition to have been unfair or inequitable.

The other tracts mentioned by Plaintiffs in Subparagraph (c) of such Amended Bill are not so described as to enable me to make an absolutely accurate check in this voluminous record. Some of them are apparently set forth in Paragraph 38 of the Special Master's Report. So far as I can discover from comparing the description as contained in such Subparagraph (c) of Paragraph 11 of the Amended Bill with the Deeds to the different Devisees, none of such tracts were treated by the Trustees in the Partition as property covered by specific devises, but by the so-called residuary clause of the Will. There is no dependable evidence that the awarding of these tracts to the persons to whom they were awarded as shown by such Deeds, is in any way unfair or inequitable to plaintiffs.

(i) Subparagraph (d) of Paragraph 10 of Plaintiffs' Second Amended Ancillary Bill of Complaint reads as follows:

"The Trustees should not have distributed a part only of the trust estate but should have partitioned the entire trust estate."

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On this question, the Special Master found as follows:

"The executors and trustees were not able to pay all of the expense of partition including the cost of building the partition fences simultaneously with the partition of the property on March 31, 1935. They therefore retained in their hands and excepted from partition, $76,029.54 in cash, accounts receivable aggregating $38,472.64 including accounts payable amounting to $357.54, and notes receivable aggregating $28,875.80, described in Paragraph 57 hereof.

During the period from March 31, 1935, to July 14, 1939, the executors and trustees collected notes receivable executed by Chapman Ranch, Inc., aggregating $13,068.73, and have on hand unpaid notes aggregating $15,707.07.

During said period the Estate paid $45.30 to J. L. Borrum, thus reducing its accounts payable to $312.24, which accounts were outstanding and unpaid on July 14, 1939.

Subsequent to March 31, 1925, accounts receivable were erroneously debited in the amount of $902.78 of which $126.00 was charged to A. L. East and $776.78 was charged to Mrs. T. T. East, thus increasing the account to $39,732.96.

The erroneous charge to A. L. East of $126.00, together with erroneous charges to L. B. Johnson, and W. M. Wright aggregating $50.19 entered prior to March 31, 1935, were reversed, reducing the accounts receivable to $39,556.77.

Cash collections during the period further reduced accounts receivable so that on July 14, 1939, same amounted to $35,098.89.

The balance of accounts receivable and payable are shown in Defendant's Exhibit 599. From this exhibit it appears that the executors and trustees have eliminated from accounts receivable the following:

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Mrs. T. T. East	$ 776.78
T. T. East	12,743.04
T. A. Simons, Jr.	2,557.55

thus reducing accounts receivable to $19,021.52.
I find that the item of $776.78 was erroneously charged to Mrs. T. T. East and that the charge off was proper; that the item of $2,557.55 charged to T. A. Simons, Jr., was also properly charged off in view of the findings made in Paragraph 50 hereof.

The record does not show the reason for the charge off of the T. T. East item of $12,743.04 except that it is stated in defendant's Exhibit No. 599 to be 'settled by improvements.'

During the period from March 31, 1935, to June 16, 1939, the executors and trustees effected certain collections and paid certain expenses, including the cost of the fences erected to carry out the partition, all of which are shown in Defendant's Exhibits 351 and 396. On June 16, 1939, there was still on hand in cash the sum of $1,843.09. I find that the expenditures so made by the Executors and Trustees during this period were proper charges against the Estate."

The entire estate was partitioned except as stated by the Special Master, and the Decree may give direction as to the small amount that remains.

4:—Other Questions Regarding the Partition Not Covered by Plaintiffs' Second Amended Ancillary Bill of Complaint, Filed March 29, 1939, in Equity 74, and by Plaintiffs' First Amended Bill of Complaint in Equity 102.

It is believed that the foregoing covers the various matters set forth in plaintiffs' Second Amended Ancillary Bill of Complaint in Equity 74 and in their first Amended Bill of Complaint in Equity 102, upon which they went to trial.
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But at the trial, plaintiffs brought forward orally and in the argument many other matters which they claim require that the Partition be set aside. Most of these were presented and disposed of in the Accounting Suit (Equity 74, Main Suit). Since they are not pleaded here, it is doubtful if they may properly be considered, but I have considered them, and make separate findings and conclusions on some, but because of their great number, not all of them. I make general findings on all of them.

(a) Did the Trustees make unauthorized Donations, Contributions, etc. out of the Trust Estate, and if so, should the Partition for that reason be set aside?

The question of such donations and contributions was raised and passed upon in Equity 74 (Main Suit).

The Report of the Special Master with respect to Donations and Contributions will be found in Paragraphs 15 and 16 thereof. Paragraph 15 deals with the largest amounts, and I quote it:

> "In Paragraph 2 of her will Mrs. King devised two lots in the City of Brownsville, Texas, to the Congregation of the Presbyterian Church South of said City of

Brownsville, and directed that her executors should erect a residence for the minister of said congregation upon said lots at a cost not to exceed $5,000. The lots mentioned in the will had been sold by Mrs. King prior to her death, but the Executors paid to T. H. Dennis, Treasurer of said church, the sum of $6,500 in lieu of said lots, and also paid the $5,000 for the purpose of erecting the residence contemplated by said will (Ex. B, part 2, p. 239).

Mrs. King was buried a few days after her death and prior to the time her executors qualified as such, in
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the cemetery in Kingsville, Kleberg County, Texas, contrary to her desire to be buried between her husband and her son in the cemetery in San Antonio, Texas, as expressed in Paragraph 13 of her will.

In Paragraph 4 of her will Mrs. King directed her executors to improve her cemetery lots in San Antonio, Texas, at an expense not to exceed the sum of $10,000. The Executors, instead of improving said cemetery lot, removed the remains of Capt. Richard King, the husband, of Mrs. Henrietta M. King, and of Ella M. Welton and Robert E. Lee King, their daughter and son, from the cemetery in San Antonio and reinterred them beside Mrs. King in Kingsville, Texas.

The Executors paid Mrs. King's funeral expenses in the amount of $1,816.50; the expense of reinterment of Capt. King, Ella M. Welton and Robert E. Lee King was $1,598.59. The expenses of moving the family monument from San Antonio to Kingsville, and of improving the cemetery lot in Kingsville, was $9,044.00 (M. Ex. 94-a; Ex. B, part 2, p. 238)."

Mrs. King was a devout and active member of the Presbyterian Church and I feel sure that this action taken by the Trustees with respect to the Presbyterian Church at Brownsville would meet her approval. Legally speaking,

I think it is with in the spirit, if not the letter, of the Second Paragraph of her Will. Certainly under all the terms and provisions of the Will, the action taken by the Trustees was within their sound discretion, and I see here no abuse of discretion.

The action of the Trustees with respect to the burial place is so clearly within the scope of their authority under the Will that it is deemed unnecessary to discuss it.

With respect to other donations, the Special Master finds the aggregate thereof and the amount of each donation, and says:
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> "I find that the moneys expended by the Estate and charged to Subscriptions and Donations were spent in the interest of the Estate and that none of said payments were made for the advantage of the Executors and Trustees as individuals."

These items show contributions and donations to churches and other similar beneficient organizations, to political organizations, to civic organizations, etc., the aggregate of which, it seems to me, is surprisingly small, taking into consideration the size and nature of the Estate and the length of time that the Trustees administered the Estate. Pointing to the statements hereinbefore made with respect to the desire of Mrs. King to have the administration of these vast properties, of which she was the head and owner, carried on for a period of ten years from and after her death just as she would have carried them on if she had lived, I think none of these donations or contributions are improper. Of course, if this had been a trust organized purely for the purpose of making money, a different conclusion might be reached. As stated, not only do I

think the Trustees had wide discretion, but the Will itself shows that Mrs. King expected them to carry on just as she would have done if she had been living.

(b) Paragraph Sixth of the Will recites that large advancements were made by Mrs. King and her husband (Captain King), and by Mrs. King after her husband's death, to their son, Richard King (identified in this Record as Richard King, Sr.). Plaintiffs complain that the partition should fall, because only a part of such advancements were charged against the heirs of Richard King, Sr. in the partition.

This question was considered and disposed of in the Accounting Suit (Equity 74, Main Suit).

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Richard King, Sr., died September 22, 1922, about two and a half years before the death of Mrs. King. At the time of his death, such advances to him amounted to approximately $21,000, for which he had executed his notes, and approximately $255,000 open account shown by Mrs. King's books. He owed others approximately $367,000, of which approximately $161,000 was secured by liens on substantically all his real estate, except his homestead. If not insolvent at the time of his death, his financial status was bad. Paragraph Six of the Will in part reads as follows [underscoring] italics mine):

> "My son, Richard King, having already received from the estate of my late husband and myself, during his father's lifetime, a large and valuable property, both real and personal, and having had, (and now having) all of the use, profits, benefits, increase, sales and revenues of the same, for many years, and having also, since his father's death, received from me, from time to time, sums of money, property and bene-

fits, to a very large amount, I do now hereby give, devise and bequeath to my said son **only such parts of my estate, real and personal, as, with the property, real and personal money and benefits, already received and enjoyed by him, as above mentioned, will, in my opinion and judgment, be just to him and to his sisters, and their descendents, in the distribution and disposition of my estate, as hereinafter provided,**—I therefore do now **hereby give and devise to my said son,** Richard King, the following real estate, or property, to wit:"

The Special Master made full findings respecting this matter, from which I quote in part:

"The debts of Richard King (Sr.) to persons other than Mrs. Henrietta King were never paid in full, but

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were refunded from time to time, and the total assets of said estate were never sufficient to pay the claims of his creditors as the total value of the real estate prior to March 31, 1935, owned by Richard King (Sr.) exclusive of his homestead, was never greater than the amount of secured debts.

On several occasions during the trust period Richard King (Jr.) acting on behalf of himself and his sisters, offered to convey to the estate all of the assets of the estate of Richard King (Sr.) deceased, in cancellation of the indebtedness to the estate, provided the estate of Mrs. Henrietta M. King would promise and agree to pay all of the outstanding obligations of the estate of Richard King, Sr. This, however, the executors and trustees of the estate refused to do, as they were of the opinion that the value of the properties belonging to the estate of Richard King (Sr.) were less than the outstanding debts and that no benefit would accrue to the estate of Mrs. Henrietta King by such a transaction.

I find that this action on behalf of the executors and trustees was in accordance with sound business judgment, and to the interest of the estate.

At the time of the partition of the properties notes aggregating $21,000 executed by Richard King, Sr., together with interest thereon, were charged to the heirs of Richard King (Sr.)."

As stated by the Special Master, the $21,000 represented by the notes were in the partition charged by the trustees against the Richard King, Sr. interests under the Will, but the open account of $255,000 was not so charged. I think it is perfectly plain from Paragraph Six of the Will that Mrs. King did not intend that her son, Richard King, Sr., should pay back to her estate these advancements aggregating $255,000, and that the trustees were right.

(c) Were the interests under the Will of Mrs. Elizabeth
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A. Baldwin and of Mrs. Henrietta M. Welton Page purchased by the Trustees for the Estate, or were they purchased by Mrs. Alice Gertrudis Kleberg?

The Findings of the Special Master as to the Baldwin interest are as follows:

"Elizabeth A. Baldwin, a granddaughter of testatrix, was advanced the sum of $100.00, in excess of the monthly bequest of $250.00 given her in the will. During the period from April 23, 1926, to May 26, 1929, the estate advanced to her the sum of $24,000.00 on open account. On the 30th day of November, 1929, Mrs. Baldwin sold her interest in the estate to Mrs. Alice G. K. Kleberg for the sum of $180,000.00 and pledged the vendor's lien obligation to secure all advances made and to be made to her. As a part of the

consideration for this conveyance, Mrs. Baldwin's notes in the amount of $24,000.00 and interest of $4,605.16, totaling $28,605.16 were charged to Mrs. Kleberg in an account known as the Mrs. R. J. Kleberg 'Baldwin Account.'

Subsequently, the executors and trustees from time to time paid Mrs. Baldwin the total sum of $8,283.17, and charged same to Mrs. Kleberg in an account known as the Page-Baldwin Loan Account. On December 7, 1930, the estate loaned Mrs. Baldwin $600.00 on her note due one year from date. Cash payments reduced said note to $34.17, which note was reserved from the partition by the executors and trustees."

The Findings of the Special Master as to the Page interest are as follows:

"Mrs. Henrietta Welton Page, a granddaughter of the testatrix, was advanced the sum of $40,560.60, in excess of the monthly bequest of $300.00 given her in

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the Will. Of this amount, $9,800.00 was reduced to a note dated February 1, 1927, and $12,820.15 was paid in cash by Mrs. Kleberg in 1929, leaving a balance due of $17,840.45.

At the time of Mrs. King's death, Mrs. Page owed her $27,000.00 on notes receivable. During the trust period, the executors and trustees made additional loans to her in the amount of $41,600.00 prior to the 12th day of March, 1929, at which time she sold her interest in the estate to Mrs. Alice G. K. Kleberg for the sum of $653,715.00, and pledged the vendor's lien obligation to secure all advances made and to be made to her.

Subsequently, the executors and trustees, from time to time, paid to Mrs. Page the total sum of $36,-

237.66, and charged same to Mrs. Kleberg in the Page-Baldwin loan account."

Negotiations between Mrs. Kleberg and Mrs. Baldwin and Mrs. Page for the purchase by Mrs. Kleberg of their interests were carried on over a long period of time, and are shown by the Record. I find nothing in the Record to indicate that Mrs. Kleberg intended to purchase the property for the trustees, nor for anyone other than herself. Such interests were not purchased with funds of the trust estate, nor is there anything in the Record to indicate that the Trustees intended to purchase the property for the Trust Estate. I think the entire Record when looked to shows conclusively that the purchase was made by Mrs. Kleberg, and not by the Trustees. I think also that under the law applicable to the facts, the property was not purchased by the Trust Estate, but by Mrs. Kleberg.

(d) Plaintiffs complain of the rent paid by the trustees for, and improvements made upon, the Encino, Stillman, 429
and Ball Ranches, leased by them, and say that the Partition should for that reason be set aside.

These matters were considered and passed on in the Accounting Suit (Equity 74, Main Suit).

With respect to the Encino Ranch and the Stillman Ranch, the Special Master finds as follows:

> "In June of 1934 (1924), Robert J. Kleberg, Jr., as Trustee for himself and for Richard M. Kleberg, Sarah Kleberg, Henrietta K. Larkin and Alice K. East, his brothers and sisters, and for Caesar Kleberg, his cousin, purchased 107,030 acres of land, more or less, in Brooks and Kenedy Counties, known as the Encino

Ranch and adjoining the Norias Ranch belonging to Mrs. Henrietta M. King, from Ed C. Lassiter.

On July 1, 1924, this ranch was leased to Mrs. H. M. King, by written agreement (Pltff. Ex. 12; Def. Ex. 168) for a period of ten years, ending June 30, 1934, at a rental of 35 cents per acre, for a year, payable semi-annually. The lease also provided that Mrs. King should keep the property in as good condition as it was in at the beginning of the lease, natural and reasonable wear and deterioration excepted.

At this time this ranch had many valuable improvements on it, then in good condition, including a frame ranch house and small barn, six small houses for Mexican Labor, twenty-four wells of which seven were flowing wells, approximately 350 miles of fences, dividing the property into twenty-eight pastures.

Within sixty days thereafter Mrs. King placed 3,500 head of breeding cows and bulls upon the ranch, and she during her lifetime, and her executors and trustees after her death, continually used said property for ranch purposes until the expiration of the trust.

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In June, 1924, Robert J. Kleberg, Jr., as Trustee for the above mentioned parties, purchased 34,934 acres of land, more or less, in Kenedy and Willacy Counties, known as the Stillman or La Tordilla Ranch adjoining the Norias Ranch belonging to Mrs. H. M. King, from the Stillman family. Simultaneously Mrs. H. M. King purchased approximately 3,200 head of cattle belonging to the Stillman family, and then located upon said ranch, and leased said property from Robert J. Kleberg, Jr., trustee, upon the same terms as she had leased the Encino Ranch. This property was also highly improved, having upon it a frame ranch house and barn, six flowing wells and two houses for Mexican labor. Mrs. King during her lifetime, and

her executors and trustees after her death, continuously occupied and used said property until the expiration of the trust.

I find that the use of the Encino and Stillman ranches was necessary and advantageous to the estate and that the rentals paid thereon were reasonable."

With respect to the Ball Ranch (and also the Encino and Stillman Ranches), the Special Master finds as follows:

"In February, 1926, the executors and trustees entered into a written contract (Plaintiff's Ex. 199; Defendant's Ex. 212) whereby they leased 20,804 acres of land, more or less, in Kenedy County, adjoining the Encino Ranch and other lands owned and operated by the King estate known as the Ball Ranch, from W. A. Ball, et al., for a period of ten years ending April 1, 1936, at a rental of 35 cents per acre per year, payable semi-annually in advance it being also agreed that the improvements on the property were in good condition and that they should be maintained by lessee in a good state of repair. This ranch was highly improved with a frame ranch house and barn, two houses for Mexican labor, well constructed outside and pasture fences and four
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flowing wells. Immediately upon the execution of this lease the estate stocked it with cattle and continuously used and operated same until the expiration of the trust.

I find that the use of the Encino and Stillman Ranches was necessary and advantageous to the estate and that the rentals paid thereon were reasonable.

In addition, the estate leased various other tracts of land as described in Exhibit B, Part 2, pages 176 to 180, inclusive, and Exhibit C, Part 2, pages 229 to 234,

inclusive. I find that all of such properties so leased were necessary and advantageous to the estate and that the rentals paid thereon were reasonable."

With respect to the improvements placed on these ranches by the trustees, the Special Master finds:

"The Encino and Stillman Ranches were leased by the estate from Robert Kleberg, Jr., Trustee, as described in Paragraph 3 hereof, and the Ball Ranch was leased from W. B. Ball, et al., as described in Paragraph 52 hereof. During the trust period the estate expended $77,099.40 for new improvements on these ranches as follows:

Fences and corrals	$42,655.45
Windmills	1,601.39
Water troughs	15,080.03
Wells	9,111.79
Dirt tanks	180.00
Cisterns	450.00
Dipping Vats	16,030.98
Machinery	110.00
Automobiles and trucks	6,279.76

and, in addition thereto, expended the sum of $64,872.01 for repairs thereon as follows:

Buildings	27,073.91

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Water facilities	26,442.12
Fences	35,455.93

I find that the new improvements placed on the above ranches were necessary to the economical operation of said properties and that the cost thereof was reasonable; that the repairs made to said property were in accordance with the terms of the contracts under which same was leased by the estate and were

necessary for the proper operation of the properties and that the cost thereof was reasonable. I further find that in spite of the sums expended for repairs and improvements said improvements were worth less at the end of the trust than they were upon the dates of the respective leases."

The Will clothed the trustees with wide discretionary powers with respect to the handling of the property of the Trust Estate, and the acquisition by lease or otherwise of other property. I see nothing in this Record which would authorize the Court to substitute its own judgment for that of the Trustees with reference to the leasing of these properties and the making of improvements and the payment of rent thereon.

(e) Plaintiffs complain of losses which they say were sustained by the Trust Estate in 1934, in connection with the effort of the Trustees to save the Robert J. Kleberg & Company private bank at Kingsville, which was in financial trouble, apparently due to the financial depression through which the country was then passing.

This matter was considered and passed on in the Accounting Suit (Equity 74, Main Suit).

The town of Kingsville was established some forty years ago, when a railroad was extended through the King
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Ranch and on to Brownsville on the Mexican Border. Soon afterwards, the Robert J. Kleberg & Company private bank was established at Kingsville. It was a partnership or an unincorporated association, and presumably each stockholder was liable for its indebtedness. Mrs. King became a stockholder April 20, 1923. She, and later the Trustees,

were the principal depositors in the bank. She, and later the Trustees were the principal owners, wholly or in part, of most of the business establishments of the town. The bank was used largely as a clearing house for Mrs. King's and the Trustees' affairs.

In 1934 the bank became insolvent, and the Trustees apparently regarded it as their duty to prevent a bank failure in Kingsville. The Special Master finds the facts with respect thereto as follows:

> "On the 20th day of April, 1923, Mrs. H. M. King acquired fifty (50) shares of the capital stock of Robert J. Kleberg & Company, an unincorporated association, engaged in the banking business in Kingsville, Texas. This partnership was organized on the first day of September, 1909, under written articles of partnership (Defendant's Ex. 41) and such partnership has continued to exist down to the present time.
>
> On November 10, 1934, the affairs of Robert J. Kleberg & Company were examined by representatives of the Federal Reserve Bank at Dallas, and as a result of said examination, a written report of the condition of the said Robert J. Kleberg & Company was made to the Federal Reserve Bank at Dallas and to the partnership (Plaintiff's Ex. 65—Defendant's Ex. 192). As a result of this examination, the Federal Reserve Bank of Dallas required that certain assets of the bank be taken out by the partners and cash be substituted in lieu thereof.

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> The items required to be taken out of the bank by the examiners were as follows:
>
> Sundry notes receivable $233,003.88
>
> Notes of the Kingsville Land & Investment Company, endorsed by Robert J.

Kleberg, Caesar Kleberg and Louise E. Flato	138,020.35
Notes of W. M. Doughty (land deal)	67,800.37
Notes of W. M. Doughty (Cattle deal)	131,471.72
Depreciation on real estate	8,644.34
Depreciation on stocks and bonds, Ragland Mercantile Co.	47,851.94
Depreciation on interest accrued but not collected	10,328.87
Making a total of	$637,121.48

On November 26, 1934, the King Estate account in Robert J. Kleberg & Company was charged with the following items:

$138,020.35	to take up the Kingsville Land & Investment Company note.
67,800.37	to take up the W. M. Doughty land note.
131,471.72	to take up the W. M. Doughty cattle note.
$337,292.44	

On December 29, 1934, the King Estate Account in Robert J. Kleberg & Company was charged with the following items:

$233,033.88	to take up sundry notes receivable.
47,851.94	depreciation on stocks and bonds, Ragland Mercantile Company.
8,644.35	To take up depreciation on real estate.
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10,328.87	to take up depreciation on interest accrued but not collected.
$299,828.04	

On the same date notes receivable totaling $233,-003.88 which are listed in Exhibit C, first part, page 34, were assigned to the King Estate without recourse on and subject to all prior liens held by Robert J. Kleberg & Company.

The note of the Kingsville Land & Investment Company in the amount of $138,020.35 was subsequently paid to the King estate by Caesar Kleberg and by the Estate of Robert J. Kleberg, Sr., by applying the amount thereof to executors' fees, the details of which appear at Paragraph 5 of this report.

The W. M. Doughty land note in the amount of $67,-800.37 is further referred to in connection with the W. M. Doughty land deal appearing in Para. 20, of this report, and the W. M. Doughty cattle note in the amount of $131,471.72 is further referred to in connection with the W. M. Doughty cattle deal at Par. 20 of this report.

The remainder of the notes and accounts charged to the King Estate, namely $299,829.04 were charged on the books of the estate as follows:

To notes receivable		$233,003.88
To profit and loss:		
Depreciation on stocks and bonds	47,851.94	
Depreciation on real estate	8,644.35	
Depreciation on interest accured but not collected	10,328.87	
Total		$299,829.04

All of the notes received by the Estate of Mrs. H. M. King as a result of this transaction were classified by

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the bank examiners as probable losses and the record does not reflect the amount which can be collected thereon by the King Estate. At the time these losses

accrued, the members of the firm of Robert J. Kleberg & Company were as follows:

John D. Finnegan	14/100
R. J. Flato	4/100
C. P. House	12/100
E. W. House	14/100
Hulda Jesse	2/100
Estate of Mrs. H. M. King	10/100
Caesar Kleberg	5/100
R. M. Kleberg	2/100
Est. of Robt. J. Kleberg, Sr.	22/100
R. J. Kleberg, Jr.	2/100
A. T. Perkins	2/100
Claude Pollard	4/100
Marcus Phillips	2/100
S. G. Ragland	5/100
W. H. Young	2/100

In December, 1934, most of the members of the partnership were unable to make any contribution toward the losses sustained by the estate. Some recovery, however, could have been had, particularly from Caesar Kleberg, Richard Kleberg and Robert J. Kleberg, Jr. No action was taken by the executors and trustees to secure contributions from the other members of the firm.

However, on June 15, 1936, Mrs. Alice G. K. Kleberg, individually and as executrix of the estate of Robert J. Kleberg, deceased, paid to Robert J. Kleberg & Company the sum of $100,000.00 to cover additional chargeoffs then being made by Robert J. Kleberg & Company (Defendants' Exhibit 71 and 72). This $100,000.00 was applied to certain notes held by Robert J. Kleberg & Company and was not applied to
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the notes which had been previously assigned to the King Estate. The notes and the amounts applicable to each are listed in Defendants' Exhibit 66."

I regard it as certain that if Mrs. King had been living in 1934, when the bank became involved, in trouble, she would have done the same thing that the Trustees did to save it and to prevent a bank failure in Kingsville and losses to the depositors. I think the Will is broad enough to authorize and require the Trustees to do the same thing.

(f) Plaintiffs complain of the action of the Trustees, and say that the Partition should be set aside because of their action, in the matter of the Robert J. Kleberg and R. Driscoll $196,587.00 Note.

This matter was passed on in the Accounting Suit (Equity 74, Main Suit).

Most of the happenings with respect to this Note were two or more years **before** the death of Mrs. King. The note, payable to Mrs. King, originally dated Nov. 4, 1922, was signed by Marx Hirsch, Alcan Hirsch, Robert J. Kleberg and R. Driscoll. Marx Hirsch and Alcan Hirsch in March, 1923, claimed that they had not executed the Note, but at a conference in San Antonio in 1923, an adjustment was made, whereby Alcan Hirsch delivered to Mrs. King 227½ shares of the Capital Stock of a bank, in cancellation of his obligation on the Note. A new Note was executed by Robert J. Kleberg, Jr., R. Driscoll, and Marx Hirsch to Mrs. King, in the sum of $196,587.00, but with a credit thereon of $51,026.85 as the value of the shares of stock delivered to Mrs. King by Alcan Hirsch. Marx Hirsch attached to the note as collateral 227½ shares of the capital stock of the bank owned by him.

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On July 14, 1923, Robert J. Kleberg as attorney-in-fact for Mrs. King, delivered a letter to R. Driscoll, stating

that at the time the original note was executed (Nov. 4, 1922), Robert J. Kleberg, for himself and as attorney-in-fact for Mrs. King, had agreed that Driscoll would not be personally liable thereon, and that this arrangement was to be continued in connection with the execution of the second note. The note was placed with the Corpus Christi National Bank for collection, and certain dividends were paid upon the stock and credited upon the note, and in the latter part of March, 1934, Marx Hirsch executed a note for $42,403.73, being one-fourth of the unpaid portion of the note, and also executed a Note in the amount of $1,484.07 for interest thereon. When this note was executed by Marx Hirsch, the $196,587.00 Note was cancelled by the Bank upon the instruction of John D. Finnegan. It was marked paid. Other items were collected, so that on November 4, 1924, Marx Hirsch executed his note in renewal for $39, 837.63, payable to the order of Mrs. King, due one year from date, with interest, etc. Thus matters stood at the time of the death of Mrs. King. It cannot be doubted that whatever had been done was done with the knowledge and full approval of Mrs. King. With respect to the action of the trustees, the Special Master finds:

> "On August 30, 1926, the executors and trustees filed suit against Marx Hirsch and the Corpus Christi National Bank in the District Court of Nueces County, Texas, asking for judgment upon the note,, for foreclosure of the lien and to require the Corpus Christi National Bank to pay over dividends in the amount of $1,137.50 which had accrued upon said stock, to the holders of the note. At the time this suit was filed, Marx Hirsch was a resident of the State of New York (Defendant's Exhibit 386).

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On October 8, 1926, the court entered a judgment

in favor of the plaintiffs in the sum of $48,376.71, being $39,837.63 principal and $4,141.20 interest and $4,-397.88 attorney's fees, ordered the defendant, Corpus Christi National Bank, to pay plaintiffs the sum of $1,137.50 to be credited upon said judgment, and further ordered the foreclosure of the lien upon the 227½ shares of the capital stock of the Corpus Christi National Bank (Defendants' Exhibit No. 387).

On December 8, 1926, the sheriff of Nueces County, Texas, acting in accordance with the order of sale issued by said Court, sold said stock to the executors and trustees for the sum of $30,000.00 (Defendants' Exhibit No. 389).

The executors and trustees sold the 227½ shares of stock, acquired from Marx Hirsch at execution sale, to R. Driscoll on the 8th day of January, 1927, for $38,675.00. Between Nov. 4, 1922, and February 27, 1931, the Corpus Christi National Bank collected $36,-316.27 principal and interest on the notes held by it for collection. The remainder of the notes held by it were uncollectible.

I find that Mrs. King never intended that Robert J. Kleberg and Robert Driscoll should be liable upon the notes and that same were executed by them with the express understanding that they would not be liable thereon; that insofar as they were concerned the transaction had been completed prior to her death and that the writedown of said note was in all respects proper and that the sale of the stock acquired by the estate at foreclosure sale was for a fair price.

I further find that the executors and trustees setup on the books all of the notes receivable as soon as the value of same had been determined and that while the auditors made increases in notes receivable on the books of the estate, the unpaid notes themselves were

at all times in the possession of the executors and trustees.

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I further find that due to bookkeeping errors the aggregate amount of the notes receivable as stated in the general ledger control account exceeded the amount shown by the subsidiary notes receivable ledger by $23,696.21. These errors, making up this difference, were traced by the auditors and are shown in Master's Exhibit 101.

I find that the aggregate of the notes shown in the subsidiary note ledger was the correct amount of the notes receivable and that no loss resulted to the estate from this difference."

It will be observed that the Master finds that everything that could be collected from Marx Hirsch was collected, and that Mrs. King never intended that Robert J. Kleberg and Robert Driscoll should be liable on the Notes, and that same were executed by them with the express understanding that they would not be liable thereon.

There is abundant evidence to support the Findings of the Master, and the action of the Trustees was proper.

(g) Should the Partition be set aside because of what was done by Mrs. King during her lifetime and by her Trustees after her death, with respect to the Kingsville Cotton Mill Company?

This matter was fully considered and passed in in Equity 74, Main Case.

The Special Master's Report is as follows:

"At the time of her death Mrs. King was the owner of 600 shares of the capital stock, having a par value

of $100 each in Kingsville Cotton Mill Company, a
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Texas Corporation, organized on April 19, 1921, for the purpose of making cotton yarn. On Dec. 8, 1922, Mrs. King loaned the company $60,000.00, taking a note for that amount payable three years after date with interest at the rate of 8% per annum, and to secure the payment of same the company executed a deed of trust covering 15.2 acres of land in the City of Kingsville, Kleberg County, Texas, and all improvements thereon including all of the textile machinery owned by it not covered by a purchase contract between H. & B. Machinery Company and Kingsville Cotton Mill Company (Defendant's Exhibit 224).

The Company was also indebted to Robert J. Kleberg and Company, Bankers, in the amount of $98,602.-66, and to H. & B. Machinery Company for $40,000, the payment of both of which had been guaranteed by Mrs. King, acting through Robert J. Kleberg, her attorney in fact.

The Company operated at a large loss until Augst 30, 1924, at which time it leased its properties to San Antonio Cotton Mill Company, a corporation, which operated a cotton mill in San Antonio, Texas. By the terms of this agreement, San Antonio Cotton Mills Company was to operate the mill at its own expense and pay Kingsville Cotton Mills Company one fourth of the net profits resulting therefrom (Plaintiff's Exhibit 192 GG, Defendant's Exhibit 446).

The operation of the mill under this contract was not profitable and the directors of the company decided to either deed the property to Mrs. King or to allow her to foreclose her mortgage. Notice of this decision was given to the stockholders by the directors on September 21, 1925 (Plaintiff's Exhibit 192 YY).

On October 21, 1925, the estate of Mrs. H. M. King entered into a contract with San Antonio Cotton Mills Company whereby it was agreed that the estate would pay for the purchase and installation of additional ma-

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chinery at the cost of approximately $50,000 and San Antonio Cotton Mills Company would continue to operate the mill, assume all losses resulting from such operations and pay one-fourth of the net profits as rental on the property (Plaintiff's Exhibit 192 Dd, Defendant's Exhibit 265).

Pursuant to this contract additional machinery was purchased by the estate, and installed in the mill during the summer of 1926.

On November 6, 1926, the estate brought suit upon the note for $60,000 dated Dec. 8, 1922, and to foreclose the lien given to secure the same (Defendant's Exhibit 235) resulting in the acquisition of the property of the Kingsville Cotton Mill Company at Sheriff's sale.

San Antonio Cotton Mill Company operated the mill at a loss for several years, but ceased operations, and surrendered same to the estate.

The amounts expended during the trust period by the estate on account of Kingsville Cotton Mill are:

Robert J. Kleberg & Co., Bankers	$ 98,602.66
H & B Machinery Company	40,000.00
Purchase of new machinery and interest on money owed H & B Machinery Company	46,285.91
Taxes and insurance paid on property of Kingsville Cotton Mill Co. prior to foreclosure	2,516.03
	$187,304.60

In December, 1931, by Journal entry 371 (Defendant's Exhibit 238) the property and machinery were valued at $98,801.94 and charged to 'Improved and unimproved city property' on the books of the estate. The loss resulting to the estate was therefore $88,502.-66.

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I find that the executors and trustees entered into the above mentioned contract with San Antonio Cotton Mills in the belief that same would be profitable to the estate and thus recoup the losses suffered by Mrs. King during her lifetime.

I think this Report speaks for itself, and although there was a loss, such fact is wholly insufficient to require the Partition to be set aside.

(h) Miscellaneous matters complained of orally or in the argument.

In the following matters covered by the Special Master's Report, and which were disposed of in Equity 74, Main Case, and upon which plaintiffs stand in attacking the partition, it is deemed sufficient to say that the facts found by the Special Master neither permit nor require the setting aside of the Partition:

Special Master's Report, Paragraph 14:
Alice L. & T. T. East.

Special Master's Report, Paragraph 21:
Kingsville Land & Investment Company:

Special Master's Report, Paragraph 24:
Kingsville Publishing Company.

Special Master's Report, Paragraph 25:
Ragland Mercantile Company.

Special Master's Report, Paragraph 34:
Rincon Improvement Company.

Special Master's Report, Paragraph 36B:
Roy Miller.

Special Master's Report, Paragraph 46:
J. K. Northway.

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(i) General Findings and Conclusions:

In considering and deciding the Accounting Suit (Equity 74, Main Case), I examined the Special Master's Report, this Record, the Briefs, etc. At the conclusion of the evidence in these two cases, I heard argument of 13 hours (6½ hours on the side). I have again examined the Special Master's Report, the Record, the additional evidence taken at the hearing of these two cases, and also examined the stenographic report of the 13 hours' argument. I find nothing which permits or requires that the Partition be struck down.

Save and except the matter of the setting up of the Special Trust for the afflicted one, Richard W. Atwood, I have been unable to find any material thing or substantial matter in which the Trustees are in error. I do think they were in error with respect to the Special Trust Fund for Richard W. Atwood, but as stated that does not require the setting aside of the Partition.

Decree will be drawn and presented, disposing of the matters set forth in the Pleading, including the sustaining of the Partition, but making provision for the setting up by the Trustees of a Special Trust Fund for Richard W. Atwood, etc.

s/ T. M. KENNERLY,
Unted States District Judge.

(No. 10055, Eq. No. 101 in the court below).

659 FINDINGS OF FACT.

Filed October 1, 1940

(Title Omitted.)

This cause having been tried before the Court without a jury, the Court finds the following facts specifically:

1. There is a diversity of citizenship and the amount in controversy is more than $3,000.00; so the Court has jurisdiction. The proper and all necessary parties are before the Court.

2. Captain Richard King, the husband of Henrietta M. King, died on April 14, 1885, leaving a last will duly probated by which he devised and bequeathed all of his estate in fee simple to his wife, Henrietta M. King.

3. Shortly after the death of Captain King, Henrietta M. King employed Robert J. Kleberg, Sr. as general man-
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ager of her properties and businesses. He acted in that capacity until her death, on March 31, 1925. For a number of years prior to her death there were associated with him under his directions in such management the other persons who, together with him, subsequently became executors and trustees of her estate.

4. Most of the estate owned by Mrs. King at the time of her death was acquired after the death of Captain King. The properties owned by her at the time of her death that were also on hand at the time of Captain King's death consisted principally of the lands known as the Norias East Ranch in the San Juan de Carricitos Grant, the exact amount thereof that was acquired prior

to the death of Captain King not being shown by the evidence. During this period of management by Robert J. Kleberg, Sr., and those associated with him, Mrs. King's estate increased largely.

5. Mrs. King's chief business was ranching and cattle raising and the buying, developing and selling of land. Most other businesses conducted on the ranch were subsidiary and incidental to the cattle business and the purchase and sale of lands, but she entered into other enterprises and investments also, not connected with the ranching business.

6. On March 1, 1919 Mrs. King executed and delivered to Robert J. Kleberg, Sr., the instrument in reference to her minerals, recorded in Volumne 1 pages 46-8 Power of Attorney Records of Kleberg County, Texas, and other counties, which is in evidence. Thereafter, acting in her behalf (joining individually by reason of his 3/32), Robert J. Kleberg, Sr. executed and delivered various oil, gas and mineral leases covering large portions of the lands. The first leases expired on account of failure to
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obtain production or pay rentals, and practically all the lands were then so leased prior to Mrs. King's death to the Humble Oil & Refining Company. At the time of Mrs. King's death the leases to the Humble Oil & Refining Company were still in effect, and there was still in effect a lease on an area of approximately 5,100 acres originally made to Flato, et al and assigned to the Humble Oil & Refining Company.

7. Mrs. King died without having named any beneficiary, uses or purposes under the mineral instrument above

referred to of March 1, 1919, and if the mineral trust therein referred to ever became effective and ever existed, then when she died without naming any beneficiary, uses or purposes, it ceased to exist and such minerals were a part of the land and so passed as a part of the land to the respective devisees thereof under her will.

8. Mrs. King left a last will which was duly probated in Kleberg County, Texas, a certified copy of which is in evidence. The Executors and Trustees named therein and who qualified and acted thereunder were Robert J. Kleberg, Sr., Caesar Kleberg and Richard King, Executors and Trustees, and Samuel G. Ragland, John D. Finnegan, Richard Mifflin Kleberg and Robert J. Kleberg, Jr., Trustee. (James B. Wells, also named as executor and trustee, died before the date of Mrs. King's death.) Robert J. Kleberg, Sr,. died on October 10, 1932. Samuel G. Ragland died September 4, 1935.

9. Shortly after the death of Henrietta M. King and their qualification, the Executors and Trustees entered into negotiations with the Humble Oil & Refining Company for a release of the oil, gas and mineral leases executed to it during Mrs. King's life, and at their request the Humble Oil & Refining Company voluntarily, with-
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out any payment or consideration therefor, released and surrendered the oil, gas and mineral leases to the Executors and Trustees, having theretofore conducted extensive drilling operations thereunder without success thereon. There was excepted from the release a tract out of the Flato lease above mentioned upon which some production had been obtained, but subsequently when production ceased to be in paying quantity on that tract the

lease on it was also surrendered by the Humble Oil & Refining Company.

10. The Executors and Trustees treated the "mineral trust" referred to in the instrument of March 1, 1919 as not being in effect after Mrs. King's death, if it had ever taken effect, and dealt with the 29/32 of the minerals referred to in said instrument as constituting a part of Mrs. King's estate and as being united with and a part of the lands and as so passing under her will and as a part of the respective lands to the respective devisees thereof. In the few instances after Mrs. King's death where Robert J. Kleberg, Sr. executed instruments or took other action in which he was referred to as attorney in fact or trustee under the mineral instrument of March 1, 1919, it was out of an abundance of caution and to satisfy purchasers to ratify the same action already taken by himself as Executor and Trustee along with the other Executors and Trustees of Mrs. King's will in reference thereto. In 1926, shortly after the death of Henrietta M. King, her grandchildren, the children of her deceased son Richard King, to-wit: Richard King, Mary King Estill and Minerva King Patch, as they had a right to do, executed an oil, gas and mineral lease to the Texas Company on certain lands specifically devised to them by Henrietta M. King outside of her testamentary trust, and upon production being obtained the question was presented to the Executors and Trustees as to whether the
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mineral trust referred to in the instrument of March 1, 1919 was in effect. All the Executors and Trustees, including Robert J. Kleberg, Sr., decided that it was not in effect, and that if it had ever existed it ceased to exist when Mrs. King died without naming a beneficiary.

This decision accorded with their previous course of conduct in reference thereto. And they consented to the payment by the Texas Company of the 29/32 of the royalty on the Crane and Upton Counties lands to the devisees of said lands under Mrs. King's will, recognizing said devisees' right thereto. And Robert J. Kleberg, Sr. rightfully executed and delivered to the Executors and Trustees the instrument of July 3, 1928, recorded in Volume 34 pages 597-600 Deed Records of Kleberg County, Texas, in evidence herein; and if the mineral trust existed after the death of Mrs. King, it ceased to exist after the execution of said instrument.

11. At the time of Mrs. King's death there was pending in the District Court of Hidalgo County a partition suit styled MacManus versus Anzaldua, et al, No. 422, in which Mrs. King was one of the parties defendant. The suit had been pending on the docket of that Court for many years. Prior to July 21, 1932, the persons who were her Executors and Trustees had not become parties to the suit in any capacity. On that date a decree was entered in the cause, a certified copy of which is in evidence. Simultaneously with the entry of the decree, an intervention was filed in behalf of Robert J. Kleberg, Sr. and other Executors and Trustees of the Estate of Henrietta M. King in their capacity as such, a copy of the pleading being in evidence; and simultaneously an intervention was filed in the name of Robert J. Kleberg, Sr. by the same counsel purporting to be in the capacities set forth in the mineral instrument of March 1, 1919. Neither Robert J. Kleberg, Sr. nor any of the 664
other Executors and Trustees knew of or authorized the filing of any pleading, intervention or appearance in be-

half of Robert J. Kleberg, Sr. purporting to act as mineral trustee under the instrument of March 1, 1919, and there was no intention to litigate or adjudicate any issue as between Robert J. Kleberg, Sr. and the other Executors and Trustees on the one hand and the said Robert J. Kleberg, Sr. in any purported capacity under the mineral instrument of March 1, 1919 on the other hand, and no controversy existed between them in reference thereto, and he did not actually become a party in such capacity. The decree, as in the case of the mineral instrument itself, did not contain any provisions attempting to supply any uses, purposes or beneficiary of the mineral instrument or any powers or duties for a trustee thereunder. Nor did such judgment contain any provisions attempting to supply any time for the taking effect of any trust thereunder or termination thereof, or to augment its provisions or supply its deficiencies as to the trust in any way. The defendants herein, Alice G. K. Kleberg, King Ranch, Mary King Estill, Minerva King Patch, Henrietta Welton Page, Elizabeth A. Baldwin and Humble Oil & Refining Company, were not parties thereto. Likewise, the defendant Richard King was not a party thereto in his individual capacity, but only in his fiduciary capacity as Executor and Trustee. The plaintiffs, Edwin E. Atwood and Alice B. Atwood, were not parties thereto, and neither Richard W. Atwood nor any conservatrix or guardian of his was a party thereto. And such persons not being parties thereto, are not bound thereby in reference to the issues involved herein. The decree in said cause is not res adjudicata of the issues and questions before this Court in this cause respecting the meaning of such mineral trust and such will and does not estop the defendants from asserting the true meaning of the

instruments as stated in the Court's conclusions herein and in the judgment herein.

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12. Neither the mineral instrument of March 1, 1919 nor the will of Henrietta M. King considered together, or separately is ambiguous insofar as the minerals are concerned. But if so regarded, the acts of the different parties thereunder were consistent with the constructions herein placed upon the mineral instrument of March 1, 1919, and her will and the construction placed thereon in the judgment herein, and the evidence does not support plaintiffs but does support defendants' view and contentions as set out in their pleadings as to their meaning, and the defendants are not by their actions or by the actions of others estopped from asserting this construction to be the true meaning of the instrument.

13. After the Humble Oil & Refining Company in 1925 had surrendered the oil, gas and mineral leases acquired by it during Mrs. King's lifetime (with the exception of the small tract upon which production was had) the Executors and Trustees of Mrs. King's estate negotiated from time to time both with the Humble Oil & Refining Company and with others for mineral leases on the lands. Under the leases previously made during Mrs. King's lifetime only nominal sums of money had been realized, but the Executors and Trustees endeavored in negotiations carried on by them to obtain large sums for mineral leases. They were unable to do so, however, until after negotiating with the Humble Oil & Refining Company over a period of several years, they finally negotiated the leases with it dated September 26, 1933, in evidence herein, by the terms of which the Humble Oil & Refining Company agreed to pay a consideration of $127,824.60

per annum each year for a period of twenty years regardless of drilling operations or production on the premises, and also the royalties in event of production, set out in the leases, in evidence. Simultaneously, the Executors and Trustees of the King Estate, in their capacities as such,
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borrowed from the Humble Oil & Refining Company the sum of $500,000 plus the sum of $2,723,645.52, evidencing the agreement to repay the $500,000 sum by a note for the amount bearing interest at the rate of five percent per annum payable annually, and evidencing the agreement to repay the sum of $2,723,645.52 by a note of $3,000,000. This sum also bore interest at the rate of five percent per annum payable annually, it being agreed that the rentals payable on the leases should be applied annually as they accrued upon the interest payable annually on the loan (the difference between the rent and interest being added to the principal of the note). The interest on the loan was subsequently reduced to three per cent per annum for a period of five years from August 9, 1938 by the agreement evidenced by Defendants' Exhibit No. 87 in evidence herein. All the agreements with the Humble Oil & Refining Company, both in reference to the oil, gas and mineral leases and the loan and the deed of trust and other instruments securing it are in evidence herein. The leases were for a fair and adequate consideration, and the terms were in accordance with the exercise of good business judgment.

Simultaneously with the execution of these agreements Robert J. Kleberg, Jr. individually and as trustee leased his lands to the Humble Oil & Refining Company upon the same terms, except that no loan was involved, for the same price per acre, with the exception that the

rentals were all paid in advance, the amounts being discounted at the rate of five percent per annum to arrive at their present value, the lands so leased by him being lands held by him as trustee for himself and brother and sisters and cousin, Caesar Kleberg, being approximately 140,141 acres of land adjoining the lands of the King Estate in Brooks, Kenedy and Willacy Counties, Texas.
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And simultaneously Alice G. K. Kleberg leased to the Humble Oil & Refining Company upon the same terms and price per acre as said Robert J. Kleberg, Jr. lease the tract of approximately 30,439.23 acres owned by her adjoining and partly surrounded by the King Estate lands in Kleberg County, Texas. Alice G. K. Kleberg and Robert J. Kleberg, Jr. pledged their royalties as surety security to further secure the Humble Oil & Refining Company in the repayment of the loan to the King Estate.

Practically the entire proceeds of the Humble loan were disbursed by the Executors and Trustees in the payment of debts owing by Henrietta M. King at the time of her death, and in the payment of moneys borrowed to pay Federal Estate and State Inheritance taxes upon her estate, and interest thereon, and the remainder was expended in the expenses of operating the estate.

14. The said lease and loan contracts are fully authorized and supported by the terms of Mrs. King's will and there was no bad faith or lack of business judgment, breach of trust, illegality, fraud or abuse of discretion on the part of the Executors and Trustees, nor fraud nor duress practiced upon them by the Humble Oil & Refining Company, and such lease and loan contracts should

be upheld, and plaintiffs' claim for damages should be denied.

15. The Executors and sole devisee under the will of Robert J. Kleberg, Sr. joined in the lease to the Humble Oil & Refining Company on account of the 3/32 interest of Robert J. Kleberg, deceased, conveyed to him by the mineral instrument of March 1, 1919 and owned by his estate. In order to pledge to the Humble Oil & Refining Company to secure the loan the entire annual rentals agreed to be paid under the leases, the Executors and
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Trustees settled with Alice G. K. Kleberg, sole devisee and executrix of his estate, for the interest of his estate in the annual rental payments. His 3/32 interest in the annual payment of $127,824.60 amounted to $11,983.55, a total during the twenty year period of $239,671, or 3/32 of the total of $2,556,492 payable under said leases. They settled with his estate for his interest of $249,671 in said rentals by discounting the same at the rate of five per-cent per annum compound interest to ascertain the present worth, paying her therefor the sum of $149,341.50. The said representatives of Mrs. King's estate had the power to enter into said contract and it should be upheld, and the plaintiffs' plea for a judgment requiring Alice G. K. Kleberg individually and as executrix to repay the sum, and their plea for recovery of the 3/32 mineral interest conveyed by Henrietta M. King to Robert J. Kleberg, Sr., should be denied.

16. Henrietta M. King during her lifetime and the Executors and Trustees after her death received all amounts owing to them for proceeds on such minerals derived from either production, bonuses, rentals, or otherwise, and there

are therefore no sums owing by Robert J. Kleberg, Sr. or his executrix, Alice G. K. Kleberg, by reason of amounts received from said oil, gas and minerals and leases thereon. Nor are there any sums due from Richard King and his sisters by reason of the sums collected by them from their leases or from production upon the Crane and Upton Counties lands or other lands.

17. Henrietta M. King was survived by children, and in the case of deceased children, by grandchildren, as follows: Her only child surviving at the time of her death was her daughter, the defendant Alice G. K. Kleberg. Her son Richard King, who died before Henrietta M. King,
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had three children surviving Mrs. King, as follows: The defendants Richard King, Mary King Estill and Minerva King Patch. Her daughter Ella King Welton, who died before Mrs. King, had one child surviving Mrs. King, the defendant Henrietta Welton Page. Her daughter Henrietta M. Atwood, who died before Mrs. King, left surviving Mrs King four children, the plaintiffs Alice B. Atwood and Edwin K. Atwood, and Richard W. Atwood (who is and has been for a period commencing prior to Mrs. King's death non compos mentis), and the defendant Elizabeth A. Baldwin. The persons named were all the children surviving Mrs. King and all of the children surviving her deceased children, and none of her descendants who died prior to her death left any descendant other than those above mentioned.

18. On March 12, 1929 Henrietta Welton Page, joined by the Executors and Trustees of the Henrietta M. King Estate, sold and conveyed to Alice G. K. Kleberg all of the interest of Henrietta Welton Page in the estate.

On November 30, 1929 Elizabeth A. Baldwin, joined by her husband, James P. Baldwin, and by the Executors and Trustees of the Henrietta M. King Estate, sold and conveyed to Alice G. K. Kleberg all of the interest of Elizabeth A. Baldwin in the estate (except her interest in the Richard W. Atwood portion).

On December 14, 1934 Alice G. K. Kleberg, having theretofore caused to be incorporated the defendant King Ranch under the laws of Texas, conveyed to it all her interest in the King Estate, including both that portion passing to her from Mrs. King and the portions acquired by her under the deeds from Henrietta Welton Page, et al and from Elizabeth A. Baldwin, et al above described.

19. At the expiration of the testamentary trust created by Henrietta M. King in her will, ten years after the 670
date of her death, the Trustees under the will partitioned and set aside the then remaining estate in accordance with the terms of the will and executed one conveyance to the King Ranch, one conveyance to the defendants Richard King, Mary King Estill and Minerva King Patch, the children of Richard King, deceased, and one conveyance to the plaintiffs Alice B. Atwood and Edwin K. Atwood, and in the same document a conveyance of segregated properties representing the Richard W. Atwood portion to Alice B. Atwood, Edwin K. Atwood and Elizabeth A. Baldwin, subject to the rights of Richard W. Atwood therein under the terms of the will. In covering specifically devised lands described in the partition deeds the Trustees conveyed to each of the respective devisees the minerals in his respective lands conveyed to them respectively, and also conveyed to the respective devisees the minerals in

the lands partitioned to them respectively out of the residuary estate, setting aside to each grantee the minerals with the respective lands as being united with and a part of the land, and so passing under the will, which was the proper course under the will for them to follow in reference to said minerals (which rightly went with the lands and not separately therefrom as alleged by plaintiffs), all being subject, however, as set out in the said deeds of partition, to the 3/32 oil, gas and mineral interest conveyed to Robert J. Kleberg, Sr. by Henrietta M. King by instrument of March 1, 1919, then owned by his estate, and subject to the Humble Oil & Refining Company oil, gas and mineral leases and the loan and instruments securing it in favor of the Humble Oil & Refining Company.

20. Plaintiffs are not entitled to any of the relief of cancellation, damages, appointment of receiver or trustee or other relief prayed for by them.

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21. In view of the above findings, and judgment herein, it is not necessary for the Court to pass upon the defendants' pleas of limitation, or upon defendants' alternative claims for relief which were contingent upon a recovery in behalf of plaintiffs of some or all of the properties or rights claimed by defendants.

CONCLUSIONS OF LAW

(a) I adopt as Conclusions of Law the two memoranda or the memorandum opinions heretofore filed in this cause, and they are referred to.

(b) It is not intended by these findings of fact and conclusions of law to determine the question of whether

or not the Trustees of the Estate of Henrietta M. King have properly and fairly partitioned her estate by the deeds of partition executed by them, that question being left for determination in other litigation pending in this Court.

T. M. KENNERLY,
Judge.

(The memorandum opinions referred to above are as follows, the first one having been filed after the hearing on the defendants' motion to dismiss, and the second one having been filed after the trial of the cause on amended pleadings.)

233 MEMORANDUM OF COURT, SUSTAINING DEFENDANTS' MOTIONS TO DISMISS.

Filed February 13, 1939
(Title Omitted)

Baker, Botts, Andrews & Wharton, of Houston, Texas;
Thomas Hart Fisher, of Chicago, Illinois; for Plaintiffs.
Robt. W. Stayton, of Austin, Texas;
Denman, Franklin & Denman, of San Antonio, Texas;
Kleberg & Eckhardt, of Corpus Christi, Texas;
Andrews, Kelley, Kurth & Campbell, of Houston, Texas;
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Felix A. Raymer, of Houston, Texas;
Perkins & Floyd, of Alice, Texas;
B. D. Tarleton, of Corpus Christi, Texas; for Defendants.

February 13, 1939

Memorandum:

This suit involves certain of the minerals in lands in ten counties in this District, described in Plaintiffs' Amended Bill, filed September 18, 1937.

Plaintiffs are Edwin K. Atwood, and Alice B. Atwood, who sues individually and as Conservatrix of the Estate of Richard W. Atwood, Distracted, and who allege that they are citizens of the State of Illinois. They sue herein Alice G. K. Kleberg, Individually and as Executrix of the Estate of Robert J. Kleberg, Sr., deceased, Robert J. Kleberg, Jr., Caesar Kleberg, Richard Mifflin Kleberg, Richard King, Jr., and John D. Finnegan, Individually and as Trustees under the Will of Henrietta M. King, and King Ranch, a Texas Corporation, and Humble Oil & Refining Company, a Texas Corporation, all alleged to be citizens of Texas. They also sue Henrietta Welton Page, alleged to be a citizen of Virginia, Elizabeth Atwood Baldwin, alleged to be a citizen of Michigan, Mary King Estill, alleged to be a citizen of Missouri, and Minerva King Patch, alleged to be a citizen of Pennsylvania. It is alleged that the amount in controversy is far in excess of $3,000.

Plaintiffs claim in their Bill an undivided interest in such minerals under the Will of said Henrietta M. King, who it is alleged died March 31, 1925. A copy of her Will it attached to Plaintiff's Bill. All of the Defendants are alleged by Plaintiffs to claim interests in such minerals, wholly or in part, directly or indirectly, under such Will. 235

(a) In Paragraphs 1 To 16, inclusive, of the Bill, the suit is one for a Decree, declaring the existence of a Trust (called for convenience herein Mineral Trust), alleged

to have been created by the said Henrietta M. King, March 1, 1919, by the execution by her of an instrument to Robert J. Kleberg, Sr., which Plaintiffs call a Declaration of Trust, a copy of which is attached to Plaintiffs' Bill. Plaintiffs say that such Mineral Trust is still in existence, and allege that Defendants say that it is not in existence, and that Defendants have proceeded and are proceeding to administer the Estate of Mrs. King, handle such minerals, execute leases covering same, etc., upon the claim and theory that such Mineral Trust has not been and is not now in existence, to Plaintiffs' great hurt, prejudice and damage. They particularly complain of two leases to the Defendant Humble Oil & Refining Company, copies of which are attached to their Bill.

(b) In Paragraph 17 of the Bill, Plaintiffs charge that independently of the Mineral Trust, the Trustees under the Will of Mrs. King were without power under such Will to execute the two Leases to the Humble Oil & Refining Company, copies of which are attached to the Bill, and they pray cancellation of such Leases, etc.

Defendants have, for numerous and various reasons, Moved to Dismiss Plaintiffs' Bill, which Motions to Dismiss have been orally argued and fully and thoroughly briefed.

In view of the values involved and the importance of the questions presented, it would be more pleasing to the Court, and perhaps to Counsel, for the Court to discuss at length in an Opinion the questions presented, but the pressure of the business of the Court will only permit a brief announcement of the Court's views upon the controlling questions.

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1: Plaintiffs' Bill on its face set forth diversity of citi-

zenship between Plaintiffs and Defendants, and a controversy exceeding $3,000, and Defendants' Motion to Dismiss for Lack of Jurisdiction is not, therefore, well taken.. Under the rule laid down in McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 80 L. Ed. 1135, and McNutt v. McHenry Chevrolet Company, 298 U. S. 190, 80 L. Ed. 1141, it is incumbent upon Plaintiffs at the trial on the merits to establish jurisdiction. Whether Plaintiffs will be able to do this in the light of Defendants' contention as to diversity of citizenship, etc. is another matter.

2: Neither is Defendants' Motion to Dismiss because of lack or defect of parties well taken.

It appears from the face of Plaintiffs' Bill that both Plaintiffs and Defendants claim under Henrietta M. King. Plaintiffs claim an undivided interest under her Will, a copy of the Will being attached to the Bill. The main contention of Plaintiffs (Paragraphs 1 to 16 of the Bill), as hereinbefore stated and hereinafter discussed, is that prior to her death and the effective date of her Will, Mrs. King created a Mineral Trust, dated March 1, 1919, with Robert J. Kleberg, Sr., as Trustee, and that Plaintiffs are insisting that such Mineral Trust now exists and Defendants that it does not now exist.

No reasons occur to me from an examination of the Bill itself why Plaintiffs, if as they allege own an undivided interest in such minerals under the Will, may not proceed against the Defendants to require them to recognize and carry out the Mineral Trust without other parties being brought into the suit.

Should Defendants raise the questions by Answer, and

the evidence disclose a lack or defect of parties, that is, of course, a different question.

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3: The backbone of Plaintiffs' case, under Paragraphs 1 to 16 of their Bill, is the upholding of the existence of the Mineral Trust, which Plaintiffs say was established by the so-called Declaration of Trust of March 1, 1919, from Mrs. King to Robert J. Kleberg, Sr.

The pertinent portion of the Declaration of Trust is as follows:

"And for and in consideration of the sum of Ten Dollars ($10.00) to me in hand paid by said Robert J. Kleberg, and the Trust and Confidence reposed in him by me, and other and further considerations received by me, and me moving thereto,—the receipt of all of which is now hereby confessed and acknowledged,—I, the said Henrietta M. King have Bargained, Sold, Assigned, Transferred and Set Over, and By These Presents do Bargain, Sell, Assign, Transfer and set over, **In Trust, However,** unto him, the said Robert J. Kleberg, the other, and remaining twenty-nine thirty-seconds (29/32nd) Parts, divided, or undivided, as the facts may be, of all of the said Oil, Gas, Sulphur, Coal, or other Minerals, or either, which I now own, or am in any manner entitled to, or to which I shall, at the time of my death, or my Estate shall, in any manner, and at any time own, or be entitled to possess, or receive, now, or hereafter, upon, in, or under, or hereafter to be found upon, in, or under, or be in any manner produced from, or marketed from, upon, in, or under, any part of the lands hereinbefore described;

"This Declaration of Trust, and the Trust Hereby Created, to continue to be, and exist, and continue in full

force and effect, for the full term of Fifty (50) Years from this, the First (1st) day of March, A. D. 1919 for the Uses and Purposes, and for all such Uses and Purposes, and for the Benefit of all such person or persons, as I may hereafter, in writing, designate and declare, or by my Will

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provide for, otherwise this said twenty-nine thirty-seconds (29/32nds) of all such Oil, Gas, Sulphur, Coal, or other Minerals to be, and remain, my own Property, and for my Own Sole Use and Benefit, and at my death, unless disposed of, be, and constitute a part, of my Estate."

It will be observed that the beneficiary or beneficiaries of the Trust are not designated or declared in the Declaration of Trust, but are to be designated and declared in writing by Mrs. King during her lifetime or in her Will. It will also beobserved that it is said that if she does not so designate and declare a beneficiary or as it is tersely put,—**"otherwise"** such interest in the soil, gas, sulphur, coal, and other minerals is to be and remain her property, for her sole use and benefit, and at her death, unless disposed of, to be constituted part of her Estate. It is not said that "otherwise" the proceeds of the administration of the Mineral Trust is to be her own property and a part of her Estate, but that the oil, gas, sulphur, coal, and other minerals themselves are to be her own property and a part of her Estate.

If the Mineral Trust ever became effective and ever existed, I entertain no doubt that it ceased to exist when Mrs. King died, without naming a beneficiary, and that such minerals became united with and a part of the land, and so passed under her Will.

Further it seems perfectly clear to me that if the Mineral Trust existed after the death of Mrs. King, it ceased to exist after the execution of the Instrument of July 3, 1928, a copy of which is attached to Plaintiffs' Bill.

Plaintiffs' allegation of estoppel (Paragraph 15 of the Bill) falls far short of being sufficient to establish that such Mineral Trust still exists, and any monies and properties received by the Trustee, Robert J. Kleberg, Sr., or
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his Executor or surviving wife, would appear (Paragraphs 7 and 11 of the Bill), when Plaintiffs' entire Bill is looked to, to belong to Mrs. King's Estate and to be recoverable only by the Trustees under her Will. Under some circumstances, Plaintiffs might be entitled to an accounting thereof and to recover same, but no such circumstances are alleged in their Bill.

Defendants' Motions to Dismiss as to the first Sixteen Paragraphs of Plaintiffs Bill, will therefore, be granted.

4: In the alternative, Plaintiffs say (Paragraph 17 of Plaintiffs' Bill) that if the Mineral Trust be not upheld, that Mrs. King's Will (copy of which is attached to Plaintiffs' Bill) did not confer power upon her Trustees to execute the two leases (September 26, 1933) to the Humble Oil & Refining Company (copies of which are attached to Plaintiffs' Bill).

I am unable to agree with Plaintiffs on that construction of the Will, and believe the Trustees were by its terms and provisions clothed with full power to execute the Leases, and their reasonableness or unreasonableness was for them to determine and may not be inquired into here.

There are no allegations of fraud or bad faith in the execution of the leases.

It follows that Defendants' Motion to Dismiss as to the 17th Paragraph of Plaintiffs' Bill will also be granted.

Let an Order be prepared and presented in accordance herewith.

T. M. KENNERLY,
Judge.

657 MEMORANDUM OPINION OF THE COURT.

Filed August 13, 1940.
(Title Omitted.)

Baker, Botts, Andrews & Wharton, of Houston, Texas; Thomas Hart Fisher, of Chicago, Illinois; for Plaintiffs.

Robt. W. Stayton, of Austin, Texas; Denman, Franklin & Denman of San Antonio, Texas; Kleberg & Eckhardt, of Corpus Christi, Texas; Andrews, Kelly, Kurth & Campbell, of Houston, Texas; Felix A. Raymer, of Houston, Texas; Perkins & Floyd, of Alice, Texas; D. D. Tarlton, of Corpus Christi, Texas; for Defendants.

(August 13, 1940).

Memorandum:

A memorandum filed in this cause February 13, 1939, sustaining Defendants' motion to dismiss, states the nature of this case as the pleadings then stood. I refer thereto. Since then, Plaintiffs have amended four times, bringing forward some, but not much, new matter. The

chief purpose of the Amendments was to amplify their Original Pleadings. The case has been tried on the merits and ably argued and briefed. I have reached the following conclusions.

1. Jurisdiction has been shown, i. e., diversity of citizenship and amount in controversy more than $3,000. The proper and all necessary parts are before the Court.

2. As to the so called Mineral Trust dated March 1, 1919, upon which Plaintiffs chiefly rely. I adhere to the 658
ruling made on hearing of Motion to Dismiss and set forth in such Memorandum filed February 13, 1939. Also to the ruling made respecting the instrument of July 3, 1928.

3. Neither the "Mineral Trust" nor the Will of Mrs. Henrietta W. King, considered together or separately, are ambiguous, insofar as the property involved herein (called for brevity the minerals) is concerned. But if so regarded, the evidence in this case as to the action of the different parties thereunder, does not support Plaintiffs; but does support Defendant's view and contention as to their meaning and the evidence in the case does not support Plaintiffs contention that Defendants are by their action or by the action of others, estopped from asserting this to be the true meaning of the instruments.

4. The MacMamus-Anzaldua Decree is not res adjudicata of the issue and questions before this Court respecting the meaning of such Mineral Trust and such Will, and does not estop Defendants from asserting the true meaning, as stated, of the instruments.

5. I construe the Will of Captain Richard King to mean that it passed to his wife, Mrs. Henrietta M. King, his estate in fee, and find that under the evidence here, Plaintiffs take no title to the minerals here involved, as heir of Captain King but only through and under Captain King's will and the will of Mrs. King.

6. The Lease and Loan contracts between the Executors and Trustees under the Will of Mrs. Henrietta M. King upon the one hand, and the Humble Oil & Refining Company upon the other hand, are fully authorized and supported by the terms of her will and the evidence shows no bad faith or lack of business judgment on the part of such
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Trustees, nor fraud nor duress practiced upon such Trustee by Said Oil & Refining Company. Such Lease and Loan contracts should be upheld.

It follows from what has been said that judgment should go for Defendants except that Plaintiffs may have judgment for the minerals to which they are entitled under this Memorandum and under the Will of Henrietta M. King.

Let a Decree be prepared and presented accordingly.

T. M. KENNERLY,
Judge Presiding.